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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-767

UNITED STATES OF AMERICA,

Appellant,

—v.—

THE CONNECTICUT NATIONAL BANK, THE FIRST NEW HAVEN NATIONAL BANK, and JAMES E. SMITH, COMPTROLLER OF THE CURRENCY,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR APPELLEES

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BRIEF FOR APPELLEES

Questions Presented

Whether the District Court's conclusion that appellant failed to sustain its burden of proving that the consolidation may tend substantially to lessen competition, actual or potential, in any relevant market is clearly erroneous (J.S. 103a); and whether any anticompetitive effects of the consolidation are clearly outweighed by the probable effect of the transaction in meeting the convenience and needs of the State of Connecticut.

Statement

A. *The Proceedings.*

On November 19, 1970, The Connecticut National Bank ("Connecticut National") and The First New Haven National Bank ("First New Haven") entered into a Consolidation Agreement for which an application for approval was filed on February 2, 1971, with the Comptroller of the Currency (J.S. 4a).[1] The Comptroller approved the proposed consolidation on July 26, 1971, after considering the opinions of the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Department of Justice.

The decision of the Comptroller found that the consolidation would be in the public interest and that there would be no significant adverse effect on actual or potential competition (App. 2566-2572). He concluded:

> "To withstand the competitive inroads of the out-of-state institutions, the local banking structure needs more large banks. This is essential to Connecticut if the wealth it generates is to remain within the state and redound to the advantage of the people who created it" (App. 2568).

On August 23, 1971, appellant filed its complaint which automatically stayed consummation of the proposed consolidation (App. 3; 12 U.S.C. §1828 (c)(7)(A)). Pursuant to 12 U.S.C. §1828 (c)(7)(D), the Comptroller intervened as a party defendant on Ocober 10, 1971 (App. 18).

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[1] The abbreviations used herein are as follows: "J.S." for appellant's Jurisdictional Statement; "Marine J.S." for appellant's Jurisdictional Statement in *United States* v. *Marine Bancorp., Inc.*, No. 73-38; and "App." for the Appendix.

Trial commenced on October 10, 1972 and continued through November 15, 1972. The court's Memorandum of Decision (J.S. 1a-103a) entered June 22, 1973, contained 293 Findings of Fact gleaned from over 2500 pages of transcript, the testimony of 24 witnesses and more than 240 exhibits, on the basis of which the District Court found that the merger would not violate Section 7 of the Clayton Act (15 U.S.C. §18). In its Order dated July 16, 1973 dismissing the action, the District Court required that appellees sell to new entrants six branches in the Towns of Ansonia, Derby, Milford and Orange as proposed by appellees (J.S. 2a, 4a). The District Court concluded that, since savings and commercial banks are "fierce competitors in this state", the appropriate line of commerce in the Connecticut banking environment includes both savings and commercial banks (J.S. 85a, 87a); that the appropriate section of the country is the State of Connecticut as a whole, although the substantial competitive impact of New York City banks in Connecticut must be taken into account in analyzing competitive effects (J.S. 92a); that no significant actual competition would be foreclosed and that "the effect of the consolidation and accompanying divestiture in the four towns [Ansonia, Derby, Milford and Orange] will be an increase in competition which is not obtainable in any other foreseeable set of circumstances" (J.S. 97a); that the merger will not tend to eliminate significant potential competition (J.S. 99a-101a); and, that the consolidation could not "trigger" other mergers which might have anti-competitive effects on Connecticut's banking structure (J.S. 101a).

Appellant contended below that, as a matter of law, commercial banking is the appropriate line of commerce within which to assess the competitive effects of the merger al-

though it offered no evidence in support of this conclusion and its witnesses testified to the contrary (J.S. 83a). The District Court relied on elaborate uncontroverted evidence, including cross-examination of witnesses called by appellant, to conclude otherwise. Savings and commercial banks compete directly for time and savings accounts, installment loans, mortgage loans, branching sites and personnel (J.S. 11a). The State Banking Commissioner and the Office of the Comptroller, as well as appellant's banking economist and all of the bankers called as witnesses by both sides, agreed that savings banks are strong competitors of commercial banks (J.S. 11a, 12a). The court below found that savings and commercial banks exhibit a high degree of comparability in operating income, investments and service charges and the one may merge with or convert into the other (J.S. 13a); that appellees compete with savings banks for 75% of their total loan portfolios; and that each appellee is directly influenced by the location of savings banks in branching decisions (J.S. 14a). The District Court found that savings banks in Connecticut have the power to accept demand deposits and offer checking accounts as of December 31, 1975 and will make this service "immediately available to the public" (J.S. 17a) and that savings banks are seeking additional consumer banking powers and are expected to continue to do so (J.S. 17a-18a).

Appellant contended below that each of Connecticut's eleven standard metropolitan statistical areas (SMSA's) and the State as a whole constituted relevant sections of the country. Appellant also argued that the four town area consisting of Ansonia, Derby, Milford and Orange was a banking market where the effect of the merger would be directly felt, and thus was a relevant section of the country although it has abandoned that contention on this appeal (J.S. 87a-

88a). Appellees contended that the appropriate section of the country consisted of Connecticut and New York City, or alternatively Connecticut alone but taking into account the proven Connecticut business generated by the New York City banks and their impact on banking competition in Connecticut.

The court concluded that the State as a whole constituted the appropriate section of the country for Section 7 analysis and considered the impact of New York City bank competition in that market. In reaching this conclusion the court relied upon extensive Findings of Fact (J.S. 18a-27a). The court found that appellant failed to carry its burden of demonstrating that the eleven Connecticut SMSA's comprise separate and meaningful geographic banking markets. The court's conclusions were well supported by the following facts of record. The criteria used for establishing an SMSA do not include any banking considerations (J.S. 18a). The Department of Justice in its report to the Comptroller on the competitive effects of the proposed merger employed the town as the unit of analysis and the State of Connecticut as the relevant geographic market (J.S. 19a). The court found that the methods used by the FDIC to compile market share data within an SMSA are substantially flawed in reporting only deposits resident in bank offices situated in the SMSA rather than the total deposits generated from the area (J.S. 19a), and that the Bridgeport SMSA accounted for only 57 percent of Connecticut National's deposits (J.S. 20a). Connecticut banks were found generally to price their services on a systemwide basis and to be influenced in their competitive behavior by every bank in their service areas (J.S. 21a). The court gave weight to the fact that none of the bankers who testified considered the SMSA concept as an accurate description of the

banking markets in which they were engaged. The court further determined that the State's two large Hartford banks operate statewide systems (J.S. 21a-24a); that six New York City headquartered banks alone draw over $483 million in deposits from Connecticut customers of which about 1,000 are larger accounts and 22,000 are commuters (J.S. 26a-27a); that the New York City banks' competitive influence is felt in appellees' service areas through widespread advertising in newspapers and on television and through personal solicitations by representatives making regular calls in Connecticut (J.S. 25a-26a); and, that meaningful banking alternatives are available to individual and corporate customers beyond the confines of each SMSA (J.S. 88a-89a).

After examining the history and trends of Connecticut's banking structure, the District Court found that appellant's claimed concentration levels did not withstand analysis and that both retail and wholesale banking customers enjoy more competitive alternatives today than in 1955. The court cited appellant's own chief witness in support of the view that " . . . Connecticut as a whole has become more competitive in banking" (J.S. 93a, 94a).

With respect to the effects of the merger on existing competition between appellee banks, the District Court found that First New Haven and Connecticut National serve different areas with the exception of the towns of Ansonia, Derby, Milford and Orange which appellant's expert, Dr. Neil B. Murphy, conceded was not a banking market. The court concluded that the net effect of the merger would be decidedly procompetitive with a dramatic reduction in the concentration of deposits in bank offices in the four towns and a net increase of four new banking alternatives

for customers in such towns as a result of appellees' agreed sale of six offices (J.S. 89a-91a).

In concluding that there would be no adverse effect on potential competition as a result of the merger, the District Court rendered extensive, painstaking and independently conceived Findings of Fact (J.S. 27a-67a). The court found that regulatory, legal and economic barriers inhibited entry by either appellee into the other's service area and that entry by both into areas in which neither now operates was not likely to occur. The court carefully examined the economic growth prospects in New Haven, Bridgeport and other leading Connecticut cities, as well as the practical availability to appellees of the alleged means of entry into other areas of the State and concluded that neither appellee possessed the finances, personnel or motivation to accomplish meaningful statewide expansion. The court found that the structure of potential competition would not be adversely affected by the merger. In no case would the merger eliminate the leading potential entrants (ranked by size and geographic proximity) into any Connecticut town or city into which *de novo* branching is lawful (J.S. 30a). All of the District Court's conclusions regarding the merger's effect on potential competition were based upon an analysis which assumed, *arguendo,* that the line of commerce was limited to commercial banks, with the court observing that these "conclusions would be strengthened if the competitive effects of savings banks had been considered" (J.S. 29a).

The District Court found that the proposed merger would not adversely affect potential competition in any of Connecticut's towns that are closed to *de novo* entry (J.S. 30a), and that entry by "toehold" acquisitions or through crea-

tion of a holding company to establish a *de novo* bank in such closed towns was either unavailable, economically unfeasible, or of dubious legality (J.S. 51a-58a, 99a-101a). With respect to those Connecticut towns open to *de novo* entry, the court found that 30 such towns have no banking offices presently and that most of these towns at best could support only single office entry by one bank, not by both appellees. In most of the open towns there would remain a significant number of potential entrants ranked ahead of both appellees by size and geographic proximity (J.S. 30a-32a). With respect to the 15 towns in Connecticut with populations over 50,000, the District Court found that at least four of the larger Connecticut banks identified by appellant as potential statewide competitors would remain as potential entrants after the consolidation (J.S. 32a). The District Court found that the most likely potential entrants into the Connecticut banking structure were banks newly organized by investors (J.S. 100a).[2] The court concluded that no probable adverse effect on the structure of potential competition had been established (J.S. 99a-101a).

Finally, the court below did not accept appellant's claim that the merger would "trigger" other mergers in view of the requirement of agency approval, the unique automatic preliminary injunction power accorded the Department of Justice under the Bank Merger Act of 1966 (12 U.S.C. §1828 (c)(7)(A)) and the case-by-case consideration that would necessarily be accorded each transaction under established antitrust principles (J.S. 101a).

After assessing the evidence presented by appellees and intervenor with respect to the needs and convenience of

[2] Since the close of trial, new banks have been organized in Monroe, Bridgeport, Trumbull, Shelton, Fairfield, Ridgefield and New Milford, all in Connecticut National's service area.

the community, the District Court found that the merger would afford procompetitive opportunities for entry into Hartford and New London not otherwise available and would mobilize the resources necessary to provide new and improved services for the entire Connecticut banking public that would not be possible without the merger (J.S. 102a, 103a).

B. *The Structure of Connecticut Banking.*

The structure of banking in Connecticut is highly competitive. The number of commercial banks has increased during the last eleven years and the number of commercial banking alternatives available to the smallest customers has increased in the majority of Connecticut's 169 towns.

At year-end 1963 there were 64 Connecticut headquartered commercial banks (App. 1597). In November 1972, there were also 64 Connecticut headquartered commercial banks (App. 2381-2390). By December 1973, six additional commercial banks had been organized with approval of the appropriate chartering authorities,[3] and two new charters have been approved in 1974, so that there are now 72 commercial banks in Connecticut compared to 64 eleven years ago.

The number of commercial banking alternatives available to Connecticut residents has increased dramatically. For those customers, such as individuals and small businesses whose banking options are often the most highly localized, there were far more commercial banking alternatives available in 1971 than in 1955.[3A] For the State as a whole ~~commercial~~ consumer banking options for these customers have increased in 107 of the 169 Connecticut towns and decreased

[3] *Connecticut Banking Dep't Bull.*, Nos. 486-551.

[3A] For commercial banks alone there were increased alternatives in 94 towns, three decreases and no change in 72 towns in the 1955-1971 period. By year-end 1972 there were increased commercial bank alternatives in 5

in only two towns from 1955 to 1971. There are more alternatives today in ~~20~~ 19 of the 23 Fairfield County towns and in ~~23~~ 22 of the 27 New Haven County towns than in 1955 and a decrease in the local options available only in the City of New Haven (App. 942; 2004A-2009).

Under appellant's theories the two dominant Hartford banks, Connecticut Bank and Trust Company ("CBT") and Hartford National Bank and Trust Company ("Hartford National") were the two most likely entrants into the City of New Haven in the 1955-1971 period. Appellant failed to file suit when each of these banks entered the City of New Haven by acquisition. Had these two banks entered New Haven *de novo,* as appellant contends is possible, rather than by acquisition, there would have been no decline in the number of commercial banking alternatives in the City of New Haven during that period (App. 942).

The proposed merger will result in no change in commercial banking alternatives available in either New Haven or Bridgeport (App. 942).

Among the 119 towns in Connecticut outside Fairfield and New Haven Counties, the number of commercial banking options has increased in ~~64~~ 63 towns, remained unchanged in ~~54~~ 55 towns and decreased in only one such town during the period 1955-1971 (App. 2004A-2009).

It is obvious that the individual borrower or small business enterprise in a particular town is benefited by having more banking options available locally. By any standard, this means that commercial banking competition in Connecticut has increased between 1955 and the present. Indeed, appellant's banking economist in this case, Dr.

Murphy, agreed that banking in Connecticut had become more competitive between 1955 and 1971.[4]

For many of the State's individuals and businesses the convenient banking alternatives available include banks beyond Connecticut's borders. These alternatives, for both businesses of even moderate size and the Connecticut residents who commute to New York City, include the nation's largest banks with offices in New York City and Westchester County adjacent to Connecticut. In a pretrial report prepared by a special master, it was established that six New York banks alone with no offices in Connecticut drew over $483 million in deposits from Connecticut in over 23,000 accounts in 1972 (J.S. 26a; App. 2353). New York City headquartered banks actively solicit corporate loan and deposit accounts as well as personal trust business throughout the State of Connecticut (J.S. 26a; App. 1373-1374).[5]

For smaller retail customers, by year-end 1975 most of Connecticut's 68 savings banks and their 229 offices will provide additional banking alternatives offering a full range of services including checking accounts (App. 225,

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[4] "The Court: Do you think between 1955 and 1971 despite the decrease in the number of banks, . . . Connecticut as a whole has become more competitive in banking?

A. Yes" (App. 273; J.S. 94a).

[5] Morgan Guaranty Trust Company has four officer/representatives who spend a total of 20-22 man-weeks per year soliciting business in Connecticut. Chase Manhattan National Bank N.A. has six officer/representatives whose primary duties include soliciting business by making calls in the State of Connecticut. Chemical Bank has five officer/representatives who travel regularly in Connecticut calling on accounts and prospects. Bankers Trust employs two officer/representatives to make calls on accounts and prospects in Connecticut (App. 1373).

2555-2563).[6] Presently, Connecticut savings banks offer a full range of retail banking services other than checking accounts including personal loans. By year-end 1975 they will offer a full range of one-stop retail banking services.

Whatever increase has occurred in commercial banking concentration in Connecticut in recent years measured by control of deposits by the larger banks is accounted for by the two Hartford banks each of which is over three times as large as the larger of the two appellees and which, combined, have made nine acquisitions without opposition by appellant (App. 2018-2020, 2023).

Before 1933, branch banking was not permitted in Connecticut. In that year limited statewide branching was authorized. Connecticut's branching laws prohibit any commercial bank from branching into any town which is the head office location of any other commercial bank.[7] The cities of Bridegport and New Haven are thus closed to *de novo* entry by virtue of this home office protection statute as were 40 other cities and towns at year-end 1971 (App. 2226).

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[6] The new Connecticut legislation according savings banks power to offer personal checking accounts provides that such power may be exercised by savings banks in all towns except those of less than 25,000 population in which the head office of a commercial bank with assets of less than $50 million is located. Even in these towns savings banks may offer personal checking accounts in the circumstances described in Section 8(b) and (c), Public Act No. 73-195 (App. 2555-2565). As the District Court found, "the provisions which apparently paved the way for compromise [leading to support of the bill by both savings and commercial bankers] give the State Banking Commission the power to order the savings banks to stop accepting such accounts if that agency determines that a savings bank is seriously jeopardizing the vitality of a neighboring commercial bank" (J.S. 16a).

[7] Conn. Gen. Stat. Ann., §§36-59.

Until the late 1960's the power to branch and merge statewide was not utilized by any of the Connecticut banks. By 1969 the two far larger Hartford banks, CBT and Hartford National began to branch and merge on a statewide basis. These two banks now dominate banking in Connecticut. Together they held 39% of the deposits of commercial banks with offices in Connecticut in 1970 (J.S. 42a). Since 1960 these two banks alone have made nine acquisitions without opposition by appellant, including acquisition of banks in New Haven and Bridgeport (App. 1553). By year-end 1972, these two banks had increased their share of statewide commercial bank deposits in Connecticut banks to 41.3% (App. 2554) and by year-end 1973 to 41.5%.[8] Both Hartford banks now operate on a statewide basis. With the exception of Union Trust Company, the State's third largest commercial bank, all other banks in Connecticut are still confined to the same general districts in which they were located in the 1950's.

The resulting banking structure thus consists of two dominant statewide banks based in Hartford, one bank, Union Trust, with offices from Greenwich on the New York border to New London on the Rhode Island border in the southern portion of the State and a number of smaller regional and local banks. Only Hartford, among Connecticut's five leading cities, is the headquarters site of banks represented in virtually all of the State's other leading business centers, including Bridgeport, New Haven, Stamford and New London. No bank from these towns has been able to enter the City of Hartford which is one of the most highly concentrated banking areas in the country (App. 801). One of the objectives of the proposed merger is to

[8] Office of the Bank Commissioner, State of Connecticut.

enable appellees to enter Hartford to challenge these banks in their headquarters city. Appellant's enforcement policies threaten to perpetuate and accentuate the imbalance of banking competition in Connecticut.

While the combined share of all deposits in Connecticut commercial banks held by CBT and Hartford National has steadily increased from 34.5% in 1959 to 41.5% in 1973, the combined and individual shares of appellees has steadily declined (J.S. 42a; App. 2554). The share of such deposits held by the next six largest commercial banks combined during the period 1959-1973 increased in some years and decreased in other years, as one would expect in a competitive environment, and experienced a net decrease from 35.8% in 1959 to 35% as of year end 1973.[9]

[9]

DEPOSIT TRENDS
EIGHT LARGEST CONNECTICUT COMMERCIAL BANKS
($ millions)

	12/31/71		12/31/72		12/31/73	
	Deposits	Share of Total	Deposits	Share of Total	Deposits	Sh T
By order of 1973 rankings:						
1 HARTFORD NATIONAL	$1,066	18.8%	$1,347	20.4%	$1,457	2
2 CBT	1,086	19.1	1,385	20.9	1,448	2
Aggregate—2 largest	2,152	37.9	2,732	41.3	2,905	4
3 UNION TRUST	530	9.3	585	8.8	627	
4 CONNECTICUT NATIONAL	370	6.5	412	6.2	421	
5 STATE NATIONAL	380	6.7	407	6.2	408	
6 CITY NATIONAL	343	6.0	373	5.6	394	
7 COLONIAL TRUST	255	4.5	287	4.3	332	
8 FIRST NEW HAVEN	266	4.7	272	4.1	282	
Aggregate—Banks 3-8	2,144	37.7	2,336	35.2	2,464	3
TOTAL—All Connecticut Commercial Banks	$5,676	100.0%	$6,614	100.0%	$7,009	10

Source: Office of the Bank Commissioner, State of Connecticut; App. 25

In the ten years from 1961 to 1971, Hartford National added $36.3 million to its capital accounts, while CBT added $41.8 million. These increments alone are each substantially larger than the total capital of either Connecticut National or First New Haven (App. 584; 2024, 2025). In the one year period September 30, 1971 to September 30, 1972, CBT and Hartford National increased their total assets by $183 million and $196 million, respectively. The combined increases in assets gained in one year by the two Hartford banks almost equal the total assets of Connecticut National and exceed the total assets of First New Haven (J.S. 9a). The combined *additional* deposits obtained by the Hartford banks, CBT and Hartford National, from December 31, 1969 to September 30, 1972 ($745.3 million) exceeded the combined *total* deposits of appellee banks at September 30, 1972 ($672.8 million) (J.S. 45a; App. 943; 2379).

For the one year ended December 31, 1972, the two Hartford banks increased their combined deposits by about $580 million. Thus CBT increased its share of deposits of commercial banks headquartered in Connecticut from 19.1% in 1971 to 20.9% in 1972, while Hartford National increased its share from 18.8% to 20.4%. During this same period, Connecticut National's share decreased from 6.5% to 6.2%, while First New Haven declined from 4.7% to 4.1% (App. 2554). Consistent with this trend, year-end 1973 figures indicate that Connecticut National and First New Haven have continued their steady decline in the percentage share of deposits held by Connecticut commercial banks, while Hartford National and CBT have continued to exploit their already dominant position. Thus, CBT and Hartford National have increased their combined share of commercial

banking deposits in Connecticut banks by a total of 3.6% while the combined share of appellees has decreased by 1.2% for the period December 31, 1971 to December 31, 1973 (see note 9, p. 14).

Traditionally savings banks have accepted personal savings accounts and made loans secured by real estate, both residential and commercial. In Connecticut, savings banks have important additional powers. They are empowered to make retail installment loans up to $5,000 repayable in monthly installments. Savings banks may commit up to eight percent of their assets to personal loans (App. 159, 466). At December 31, 1973, Connecticut savings banks had total assets of $8.3 billion.[10] Accordingly, at that date about $661 million were available at Connecticut savings banks for personal loans. Mutual savings banks are, therefore, a reasonable substitute for commercial banks for retail borrowers seeking personal loans of up to $5,000 for a wide variety of purposes, and appellant's banking expert so agreed (App. 159). Savings banks offer other banking services such as safe deposit box services and money orders, as well as insurance services (App. 1066-1067).

Savings banks in Connecticut have more total deposits than commercial banks. At year-end 1971 savings banks had $6.1 billion in deposits while commercial banks accounted for $5.7 billion (App. 2361; 1550-1551). At June 30, 1973 savings banks accounted for $7.4 billion while commercial banks accounted for $6.4 billion in deposits.[11]

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[10] Office of the Bank Commissioner, State of Connecticut.

[11] Federal Deposit Insurance Corporation, *Summary of Deposits in all Commercial and Mutual Savings Banks*, June 30, 1973.

Thus savings banks are increasing their deposit lead over commercial banks in Connecticut.[12]

No later than December 31, 1975 savings banks in Connecticut will have the power to accept demand deposits in non-interest bearing personal checking accounts (J.S. 17a-18a; App. 1013-1014). Savings banks by that date will be substantially interchangeable with commercial banks in supplying the needs of retail banking customers.

C. *The Parties*

Connecticut National had $412.2 million in deposits at year-end 1972 and ranked sixth among all banks headquartered in Connecticut and fourth among commercial banks (J.S. 3a)[13] Connecticut National operates 51 offices of which 41 are located in Fairfield County adjoining Westchester County in New York. While appellant claims that "Connecticut National is the largest commercial bank with headquarters in the Bridgeport metropolitan area" (Appellant's Brief at 10), this statement is highly misleading. Connecticut National is, in fact, the fourth largest commercial bank in the Bridgeport SMSA (which appellant claims is a relevant market) in terms of deposits, total resources and legal lending limits (App. 1550, 2380).

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[12] This is in sharp contrast to a situation where " . . . there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get ½ of 1 per cent more interest [at a savings bank]", *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 357 n. 34 (1963).

[13] According to the Annual Report of the Bank Commissioner of the State of Connecticut, March 6, 1973, pp. 108-109, there were five savings banks with total deposits at December 31, 1972 larger than First New Haven and two savings banks with deposits larger than Connecticut National. Thus, the actual rankings of First New Haven and Connecticut National at year-end 1972 were thirteenth and sixth among all Connecticut banks.

At year-end 1972, Connecticut National was the second largest of the Connecticut-headquartered commercial banks competing through offices located in the City of Bridgeport, and the fourth largest in Fairfield County, ranking behind CBT (and virtually the same size as State National Bank of Connecticut with $407 million in deposits) in Bridgeport and also behind Hartford National and Union Trust Company in Fairfield County (App. 1550-1551; 1553-1558). City National Bank headquartered in Bridgeport is also nearly equal to Connecticut National in size. In Bridgeport, People's Savings Bank had 1972 deposits of $836 million, over twice the size of Connecticut National's 1972 deposits.[14] Connecticut National faces substantial competition from many of the largest banks in the nation located in New York City and Westchester County, which is adjacent to Fairfield County. These banks advertise by newspaper, radio and television and solicit accounts throughout Connecticut National's entire service area (J.S. 25a, 41a-42a).

First New Haven, with 1972 year-end deposits of $272 million, ranked thirteenth among all banks and eighth among commercial banks headquartered in Connecticut (J.S. 3a-4a).[15] Appellant describes First New Haven as "the second largest commercial bank with headquarters in the New Haven metropolitan area" (Appellant's Brief at 11). This ranking, like appellant's ranking of Connecticut National in Bridgeport, is also highly misleading. In terms of deposits, total resources and legal lending capacity, First New Haven ranks fourth among commercial banks with offices competing in the City of New Haven behind Hartford

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[14] *Bank Commissioner of the State of Connecticut, 1972 Annual Report*, 108, March 6, 1973.

[15] See note 13, p. 17, *supra*.

National and CBT (both over five times its size) and Union Trust, over twice its size (J.S. 43a; App. 1550-1551, 2380 and note 9 p. 14, *supra*). Two savings banks in New Haven also exceeded it in size. It thus ranked sixth among all banks with offices in New Haven. First New Haven operates 22 offices, all in New Haven County (J.S. 4a).

The merging banks' combined share of total deposits of all Connecticut-headquartered banks has decreased from 6.8% in 1959 to 5.0% in 1972 (App. 2019, 2554), while their share of total deposits held by all Connecticut commercial banks decreased during the same period from 13.8% to 10.3% (App. 2027; 2554) and continued to decrease to 10.0% at year-end 1973.[16] The combined banks' share of deposits held at year-end 1973 by Connecticut-headquartered commercial banks amounted to less than 9% when reduced by only the *proven* deposits derived from Connecticut by only six New York City and four Boston-headquartered banks and by the deposits in the offices of the merging banks to be sold, and to less than 4.5% with respect to all Connecticut bank deposits, including savings banks (J.S. 104a-105a; note 9, p. 14, *supra*).

While it is claimed that Connecticut National was more profitable in 1970 than in 1961 (Appellant's Brief at 11), the increase in the bank's profitability in terms of return on investment occurred largely during the latter half of this period. Connecticut National opened 15 *de novo* branch offices from 1960 to 1965 and only 5 offices in the latter half of the 1960's (J.S. 46a). The bank's profitability increased by about 30%, largely because the bank's *de novo* branching activity was curtailed (App. 953; J.S. 46a).

[16] See note 9, p. 14.

From 1965 to 1970, Connecticut National had the lowest rate of increase in the number of new branches among the State's nine largest commercial banks (App. 2026; J.S. 46a). The profitability of those branches opened *de novo* in the twelve year period prior to 1971 was 26% less than the overall profitability of the bank (App. 953).

In terms of how the securities market appraises its profitability and growth prospects, the price-earnings ratio of Connecticut National's stock of seven to one at the time of trial was the ninth worst among the State's ten largest banks and substantially below the price-earnings ratio of the stock of CBT and Hartford National which were about ten to one (App. 958-959).

Appellant claims that First New Haven is expanding rapidly and realizing greater profitability (Appellant's Brief at 11, 12). The evidence, however, is uncontroverted that First New Haven has opened nine *de novo* offices since 1963, of which five are in the City of New Haven (App. 1562); that in 1971 nine of the bank's twenty-two offices were still showing operating losses amounting to $535,000 per annum (J.S. 51a); and that of the nine largest commercial banking organizations in Connecticut, First New Haven was among the lowest in operating earnings (App. 2026). Indeed, First New Haven's share of branches, assets, equity capital and operating earnings among the nine largest commercial banks in Connecticut declined in each category over the 1965-1970 period (App. 2026). First New Haven's net income for the year ended December 31, 1973 ($2,564,490) decreased 6.5% from 1972 earnings ($2,742,013).

Introduction and Summary of Argument

In this case the District Court, relying in part on testimony of appellant's own witnesses, found the facts to be contrary to appellant's assertion that the two banks are "significant potential entrants into each other's markets." The court relied on objective evidence of the legal, regulatory and financial barriers to new entry which vary town-by-town in Connecticut, the economic inducements motivating the banks and the number and strength of banks remaining after the merger having the potential to expand statewide, under appellant's own criteria. No undue weight was accorded the expressed intentions of appellees' own officers nor did the court misconstrue any of the standards for assessing probable effects on competition, actual or potential, as applied by this Court. With painstaking thoroughness, the court below examined the history, structure and probable future of Connecticut's rapidly changing banking industry and found that appellant's statistical presentation on market shares and concentration did not reflect market realities. This necessity to look beyond raw measures of supposed competitive position was recently confirmed in *United States* v. *General Dynamics Corp.*, No. 72-704, 42 L.W. 4368 (U.S., March 19, 1974). In looking beyond appellant's exhibit tables to discern the probable competitive effects of the merger, the District Court recognized abundant evidence that competition for the business of the Connecticut banking public cannot adequately be measured without taking into account the impact on that market of New York banks and the expanding retail banking powers of Connecticut's savings banks.

I.

The District Court correctly determined that appellant failed to establish any of the eleven Connecticut SMSA's as relevant sections of the country. The claim foundered on record evidence of where the sellers of banking services operate in Connecticut and where buyers of such services may practicably turn for supplies. The very criteria relied upon by appellant to establish the SMSA concept—economic and social integration of the population and businesses in the area—were challenged by appellant itself in its argument to this Court in *United States* v. *Phillipsburg National Bank*, 399 U.S. 350 (1970). Appellant also rejected the SMSA as defining a relevant market in *Philadelphia, supra, Brown Shoe Co. Inc.* v. *United States*, 370 U.S. 294 (1962), and *United States* v. *Third National Bank in Nashville*, 390 U.S. 171 (1968). No banking data is taken into account by the federal agency that draws SMSA lines. Appellant's own expert conceded that the Norwalk and Stamford SMSA's may well be considered in the same market as New York City in view of the cross-commutation and advertising influences of New York City banks permeating Fairfield County where most of Connecticut National's offices are located. Six New York City banks alone were shown to have generated about $500 million in deposits from over 23,000 Connecticut customers. The District Court found simply that the SMSA did not adequately reflect competitive realities in Connecticut, either in terms of the pricing behavior of competitors, given the areas where their offices are located (and the fact of systemwide pricing established by the testimony), or in terms of the intermediate-sized customers which have ready access to services of banks in New York City as well as those in Connecticut. In view of

the power of Connecticut banks to branch statewide, subject to home office protection, the competitive strength of the dominant statewide Hartford banks which have exercised that power, and the customer options described by appellant's own witness, the District Court properly concluded that the relevant geographic market is the entire State and that the town, and not the SMSA, is the appropriate unit for analysis of potential entry, since legal barriers to entry are erected on town lines.

II.

Appellant contends that the certainty of a doubling of customer alternatives for one-stop retail banking in Connecticut is unworthy of consideration either to justify inclusion of Connecticut's savings banks within the relevant line of commerce or to be taken into account in assessing the effects on future competition in a commercial banking line of commerce. Connecticut's legislature, in May 1973, accorded savings banks the power to offer personal checking account services no later than year-end 1975. Appellees presently compete for about 75% of their loan volume and just under half of their deposit volume with savings banks which have more deposits than commercial banks. By year-end 1975 appellees will be in competition with savings banks for over 90% of their combined deposit accounts. Nevertheless, the District Court limited its analysis of the effect of the merger on the structure of potential competition in Connecticut to commercial banks, noting only that its conclusions would be strengthened if savings bank competition had been taken into account.

III.

The theoretical underpinnings of the potential competition doctrine, as reflected in economic literature, are concerned with the significance of barriers to entry, the strength or weakness of the actual competition among those already in a market as determinants of market behavior and the number and strength of the potential entrants left after merger of an actual competitor and a potential competitor. The reliability of concentration ratios in local commercial banking markets, as measures of the strength of actual competition, is diluted significantly by their failure to reflect either the competitive influences on pricing of bank services from commercial banks outside the local market or the substitutes for commercial bank services offered by other financial institutions such as savings banks. These influences also dilute the importance of the possibility of entry into a locality by an outside commercial bank where the constraints on pricing and the pressures for better services exerted by such existing influences are of more concern to existing sellers than the entry of new competitors. If new entry by a potential commercial bank competitor is not perceived by existing sellers to be a realistic possibility due to entry barriers, such as Home Office Protection legislation or the absence of toehold acquisition candidates, the importance of potential competition is further diminished. In this case, investigation of the size and number of the remaining potential entrants into Connecticut towns, both open and closed to *de novo* branching, shows that the merger would not eliminate one of only a few likely potential entrants into any town in Connecticut.

IV.

With Bridgeport and New Haven both closed to *de novo* branching, appellant's case consists of no more than an invitation to speculate on the ways the appellee banks might structure future moves to overcome these two inconvenient facts. No bank in Connecticut is perceived as a potential entrant through the device of chartering a new bank and affiliating with it through a holding company (in obvious circumvention of Home Office Protection legislation) since the device has never been attempted in Connecticut. There are no toehold acquisition possibilities in existence in New Haven where five of the State's ten largest banks are already engaged in competition and where the population and employment have declined significantly. The District Court found that no significant prospect existed that Connecticut National would surmount these barriers to entry, and appellant offered no evidence that the bank exerted any actual or perceived competitive influence on New Haven competitors from the fringe of the market. Alleged possibilities of entry into suburban New Haven SMSA towns were examined in detail and found wanting as effective means of attracting New Haven business. First New Haven competes in New Haven with three far larger commercial banks and two considerably larger savings banks. It is neither dominant in its primary service area nor one of only a few likely entrants into Bridgeport. If it could enter, it would rank behind four existing commercial bank competitors and the State's second largest savings bank, three times its size.

Again, the court below held on ample evidence that no tangible prospect for First New Haven's entry into Bridge-

port was shown, nor was there sufficient economic inducement in light of Bridgeport's stagnant economic condition and First New Haven's financial capacity. With nine of First New Haven's twenty-two offices showing aggregate losses of over $500,000 per year in operating results and with an overall financial record lagging near the bottom of the state's nine largest commercial banks, appellant failed to show any reasonable likelihood that it would enter Bridgeport. First New Haven was shown to rank no better than fourth in size among the potential entrants into Bridgeport behind Hartford National, Union Trust and Colonial Trust.

At the same time, objective evidence established that Connecticut National's rate of branch expansion had slowed markedly in the five years prior to 1970. The obstacles to future competition developing between appellees in the Connecticut towns open to *de novo* branching stem from the fact that such towns are typically rural or suburban areas with low densities of population. In 41 of the 128 open towns as of June 1972, no bank had seen fit even to seek entry. In many of the towns where both appellees would have to obtain branch regulatory approval to become competitors, the entry of two additional banks would reduce the population per banking office significantly below the state average to a point approaching the level where no bank has been induced to enter.

Appellant produced no evidence whatsoever that either appellee was a dominant potential entrant into any area of the State or that either exerted competitive influence from the fringe of any local market or was perceived by existing entrants to be a potential competitor. The objective evidence of legal, regulatory and financial barriers to

entry, together with the testimony of Professor Merton J. Peck,[17] established, moreover, that neither First New Haven nor Connecticut National were "actual potential entrants" under the standards set forth in *United States* v. *Falstaff Brewing Corp.*, 410 U.S. 526 (1973) which the District Court applied. The District Court's conclusions with respect to the number and strength of remaining potential entrants into the Connecticut towns in question were amply supported by findings of fact based on the objective criteria utilized by appellant.

Finally, the trends toward increasing numbers of banking alternatives within Connecticut's banking structure and its probable future development led the court below to conclude that the proposed transaction would not eliminate significant actual or potential competition or trigger other mergers. In reaching this conclusion, the District Court was unwilling to accept appellant's statistical allegations with respect to market shares or local market concentration levels as meaningful measures of banking realities in Connecticut. *United States* v. *General Dynamics Corporation, supra.*

V.

Since appellant failed to establish a violation of §7 of the Clayton Act, the court below had no difficulty concluding that the substantial procompetitive effects of merger in creating new prospects of entry into Hartford and New London would serve the public interest and invigorate competition statewide. These benefits were found, on substan-

[17] Professor Peck is the Chairman of the Department of Economics, Yale University, and a former member of the President's Council of Economic Advisors.

tial evidence, to be obtainable through no other means than this merger.

VI.

Appellant failed to offer any evidence whatsoever to support its "linked oligopoly" theories upon which it now appears to rely in its brief (Appellant's Brief at 34).

VII.

Appellant concedes that this case presents potential competition issues in "a different factual context" from *United States* v. *Marine Bancorp., supra* (J.S. 12, 13). According to appellant, Marine had "total deposits of $1.6 billion (22.8 percent of total deposits held by Washington's commercial banks)" (Marine J.S. 7), savings bank competition in Washington does not approach that in Connecticut, banks in Washington have used the holding company method of entering closed towns; banks in Spokane perceived NBC to be a potential entrant into Spokane, and there was evidence of anticompetitive behavior among banks in Washington; and NBC had a "long standing and conceded interest" in entering Spokane.

I.

The State of Connecticut Is the Relevant Section of the Country

A necessary element in appellant's theory of adverse effect on potential competition is the claim that the Bridgeport and New Haven SMSA's are both meaningful banking markets and therefore relevant sections of the country. Contrary to appellant's prior arguments made to the Court in *Philadelphia, supra, Nashville, Phillipsburg, supra,* and *Brown Shoe, supra,* appellant is now asking this Court to conclude that the SMSA is *ipso facto* a relevant section of the country, since it is a "useful tool" for banking market analysis, while conceding that its value as such "will vary from case to case" (Appellant's Brief, at 41).

A. *Appellant Failed to Prove That Any Connecticut SMSA Is a Relevant Section of the Country.*

The District Court had before it ample basis for its conclusion that appellant did not meet its burden of establishing that Connecticut's SMSA's are banking markets or sections of the country.

Based in part on appellant's own evidence and the testimony of its own witnesses, the District Court rejected the claim that evidence on the manner in which SMSA's are delineated by the Bureau of the Census is sufficient to establish those areas as banking markets.

The District Court had respectable company in reaching this conclusion. Appellant said in its pre-trial brief in *Phillipsburg,* "An SMSA does not purport to be an all-

purpose description of the marketing areas of all businesses within it, and while the SMSA concept may be useful for collecting and organizing statistical data, its adoption as the relevant geographical market in this case would, in our view, be unwarranted." [18]

The District Court in this case agreed with appellant's position as it was stated in *Phillipsburg, supra.*

Appellees' position and the decision of the District Court are in strict accord with the decisions of this Court. The town or community is the appropriate unit for analysis of effects on potential competition in Connecticut where home office protection, and thus the possibility of branching *de novo,* varies by town. As this Court has pointed out: "[W]hile there is undoubtedly some commercial intercourse between smaller communities within a single '*standard metropolitan area*', the most intense and important competition . . . will be confined to . . . the *particular communities in such an area* and their immediate environs." *Brown Shoe,* 370 U.S. at 339 (emphasis added).

The State as a whole is the relevant "section of the country" within which to appraise any overall competitive effects because, subject to home office protection, that is the area "which state law apparently recognizes as a meaningful banking community in allowing . . . banks to branch within it . . . ." *Philadelphia,* 374 U.S. at 361.

Appellant contends in this case that the Bridgeport and New Haven SMSA's constitute relevant sections of the country in which to gauge effects of the merger on potential

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[18] Pre-trial Brief in *United States* v. *Phillipsburg National Bank,* 306 F. Supp. 645 (D. N. J., 1969); rev'd *Phillipsburg, supra.*

competition because "[a]n SMSA is an area characterized by *economic and social integration* as reflected in patterns of residence and employment . . ." (emphasis added) (Appellant's Brief, at 36, 35-37). In *Phillipsburg*, appellant claimed the District Court erred in its holding on relevant market precisely because it "stressed the *economic and social integration* among the population and other businesses in the . . . area. . . ." (emphasis added).[19]

One of the reasons appellant may have thought in *Phillipsburg*, *Philadelphia*, *Nashville*, and *Brown Shoe*, *supra*, that SMSA's do not automatically fit this Court's test of an appropriate geographic market is that SMSA integration tests are met on the basis of cross-commutation in the 15%-25% range. Therefore, the fact that a town is included in an SMSA has little meaning for the banking convenience of the vast majority of the population in that town. The data showing where appellees' individual offices derive their business demonstrate that it is the town or city where the office is located which accounts for the great bulk of the business, typically 60% to 85% (App. 1519-1527, 1535-1540).

In support of its contention in this case that the SMSA's are relevant geographic markets, appellant argues that Connecticut National's Fairfield office[20] draws more than 84.4% of its demand deposit and loan business from customers with addresses in the Bridgeport SMSA. This argument proves nothing since these customers' addresses are also in the State of Connecticut and in the United States. What is meaningful is that 77.1% of the business

[19] Brief for Appellant at 32-33, *Phillipsburg*, *supra*.

[20] This office was selected by appellant as an example at page 37 of its brief.

of the Fairfield office of Connecticut National comes from the town of Fairfield. These customers do not, apparently, consider the entire SMSA a meaningful source of banking options. The great bulk of the customers of such offices have convenient banking alternatives limited to locations within the town itself.

Nevertheless, appellant continues to argue here that because the Office of Management and Budget and formerly the Census Bureau characterize an SMSA as an area which is "economically and socially integrated," the SMSA is *ipso facto* a section of the country within the meaning of Section 7 of the Clayton Act. Appellant's principal evidence in support of this proposition was the testimony of Dr. Frederick Glantz, who simply described the manner in which SMSA's are delineated. Dr. Glantz, who conceded his lack of expertise in banking (App. 80) and who made no analysis of competition or banking markets in this case, admitted that the definition of SMSA's did not include consideration of any banking data and was not developed as a tool for analyzing banking markets (J.S. 18a).

The only test for linking towns to central cities, as required by the Office of Management and Budget in constructing SMSA's, is that at least 15% of the workers living in a town work in the central city or that 25% of the workers in a particular town live in the central city.

The problem of applying these arbitrary criteria to aggregations of New England cities and towns in particular was described by appellant's own expert in regional economics, Dr. Glantz, as follows:

> "When we talk about economic integration, it is possible for one area to be economically integrated with

more than one area. The Office of Management and Budget would then place that area in the SMSA of the area with which it has the greatest amount of economic integration. So when we get into New England, this becomes a problem because the metropolitan areas in New England tend to border one on top of the other, and when we come into the fringe areas there would be economic—sufficient economic integration for them to go either way. They are classified in the metropolitan area with which they have the greatest amount of economic integration" (App. 84-85).

Appellant offered no evidence on the percentages of residents in any Connecticut SMSA who bank within the same SMSA. Instead, appellant, in effect, asked the court below to assume that SMSA definitions automatically delineated practicable banking options based on the commuting patterns of a minority of residents. If this is so, however, it does not appear to be an immutable principle in view of the position taken by appellant in the *Phillipsburg, Philadelphia, Nashville,* and *Brown Shoe* cases, *supra.*

This Court in *Philadelphia,* at the urging of appellant, specifically rejected the eight county Delaware Valley area, which comprises the Philadelphia, Pennsylvania-New Jersey SMSA, as the appropriate section of the country, 374 U.S. at 357. The court below had stated that "[a]t the very least, it [the section of the country] must include the entire Delaware Valley." 201 F. Supp. 348, 364 (E.D. Pa. 1962). Appellant contended in this Court that that was error.

Appellant argued in this Court in *Phillipsburg, supra,* that the SMSA was not the appropriate section of the country in which to evaluate the competitive effects of the proposed merger of Phillipsburg National Bank and Trust Company and Second National Bank of Phillipsburg.

There the SMSA included Lehigh and Northampton Counties in Pennsylvania and Warren County in New Jersey. But appellant argued that Phillipsburg-Easton, a smaller area, was appropriate and this Court accepted that argument. Appellant argued that the District Court in that case erred when it "stressed the economic and social integration among the population and other businesses in the larger merchandising area that it viewed as the only appropriate geographic market" (in other words, the SMSA).[21] Appellant now contends that the District Court in this case should have done what it contended was error on the part of the District Court in the *Phillipsburg, Philadelphia, Nashville,* and *Brown Shoe, supra,* cases.

In analyzing the banking market from the point of view of both sellers and buyers, contrary to appellant's argument that it relied on a seller-oriented market approach, the District Court found correctly that the Bridgeport SMSA does not comprise Connecticut National's relevant banking market, in part because only 57% of Connecticut National's deposits originated from towns in the SMSA. The District Court concluded that Connecticut National's market was the area within which it had established branch offices (J.S. 20a).[22] That area consisted of 25 towns in Fairfield, New Haven and Litchfield Counties. The District Court found the SMSA concept "particularly useless in New England where banking organizations have offices and derive substantial deposits beyond the boundaries of the SMSA where their head offices are located" (J.S. 20a). He observed that the three federal bank regulatory agen-

[21] Note 9, p. 14.

[22] *Cf. Philadelphia,* 374 U.S. at 361, where the Court noted that the area where the banks had branched was the area of effective competition.

cies define a bank service area as the geographic area from which the bank derives 75% of its deposits (J.S. 20a). Appellees' service areas, as so defined, extend beyond the Bridgeport SMSA in the case of Connecticut National to the New York border on the west, encompassing the Stamford and Norwalk SMSA's, and to the north including the Danbury and Waterbury SMSA's, and in the case of First New Haven beyond the New Haven SMSA.

Appellant argues that this is a seller oriented market approach and that it is error to construct market definitions on the basis of where the seller offers his products.[23] Appellant's expert on banking markets testified that a geographic market consists of the area in which decisions as to output and price are affected by participants in the market (App. 114). The very basis for appellant's contention that the State of Connecticut is itself a relevant section of the country is the branching and entry potential of *sellers* of banking services, with no reference whatever to the options of buyers (Appellant's Brief, at 31, 32). There is, of course, a buyer and seller side of every market definition, as this Court held in *Philadelphia.* But the service area of a bank is surely the ". . . area in which the seller operates . . . ."[24] as this Court put it in *Philadelphia.*

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[23] In stressing a consumer oriented analysis appellant is again shifting its course to accommodate the exigencies of its case. In *United States* v. *General Dynamics Corp., supra,* at 4369, this Court pointed out that the appellant's proposed geographic markets "'were based essentially on past and present production statistics and *do not relate to actual coal consumption patterns,*'" quoting *United States* v. *General Dynamics Corp.,* 341 F. Supp. 534, 556 (N. D. Ill. 1972) (emphasis added).

[24] 374 U.S. at 359.

The other side of the question is where can the "purchaser . . . practicably turn for supplies . . . ."[25] The evidence established that an overwhelming majority of retail bank customers practicably turn for supplies to the banks in the town where they live. Businessmen seeking commercial loans and other services available from commercial banks can practicably turn for supplies to banks over a broad geographic area and for customers in New Haven and Bridgeport this area clearly includes New York. It is not even necessary for a commercial borrower to go to New York to obtain such a loan, although New York banks have numerous offices close to the Connecticut border, for New York banks actively solicit commercial banking business throughout the State of Connecticut (J.S. 26a).

Appellant complains that the District Court by holding appellant to a higher standard of proof than SMSA commuting patterns and office origination data of appellant banks is requiring a definition of the market by "metes and bounds" which this Court rejected in *United States* v. *Pabst Brewing Co.*, 384 U.S. 546 (1966). In fact, the District Court's findings on the question (J.S. 19a-21a) demonstrate ample factual basis for rejecting SMSA's as relevant sections of the country as did appellant and this Court in *Philadelphia, Phillipsburg, Nashville,* and *Brown Shoe, supra.* The evidence was clear that the SMSA has little relationship either to an area of effective competition among sellers of banking services in Connecticut, or an area to which the purchaser can practicably turn for supplies. The District Court found (J.S. 20a-21a) that the most appropriate means by which to measure banking markets geographically is to determine the area "in which banking

[25] *Id.*

products or services are sold by a group of firms which *act* as though they are competing and *evaluating evidence from representative consumers about where they actually conduct their banking business*" (Id.) (emphasis added). Contrary to appellant's statements, the District Court correctly considered the market from the standpoint of both seller and buyer and, accordingly, did not apply an exclusively seller-oriented standard. Appellant failed to supply meaningful evidence of customer alternatives for the court to evaluate. What testimony there was by appellant's banking expert, Dr. Murphy, which is somewhat inconclusive, indicated that the medium sized corporate borrower probably did not confine his shopping to any particular SMSA.[26]

We agree with appellant that market definition depends upon "the geographic structure of supplier—customer relations." (Appellant's Brief, at 43). So did the District Court which analyzed the market from the standpoint of the seller banks (J.S. 18a-27a) and from the standpoint of the convenience of customers (J.S. 29a-40a). The court below gave weight to the testimony of the sellers themselves regarding the relevant geographic area in which they

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[26] "Q. It is your belief, then, that borrowers in the $25,000.00 range don't shop very much? A. I would—I don't know. I don't know that I'd put any number on it, I don't know that—we studied—the study that we conducted at the corporation [FDIC] a number of years ago, had the number somewhat larger than on the average locally limited loans are somewhat —what larger than $25,000.00, but that study was based on data that was—it is rather old and it is—it is the only information we really have, but that was data that [was] produced in the 1957 loan survey. Other than that, we don't have any agreeable good notion of what that cutoff might be.

"Q. So you don't really know? A. Well, we don't have any —we knew—we—a good feeling that the number was near fifty thousand, in that general range, at that time, and that's all we can really go on" (App. 172-173).

considered themselves to be competing. For example, the only two bankers called as witnesses by appellant testified that the SMSA concept meant nothing to them in terms of defining a banking market. Mr. Blackford, President of a competitor headquartered in Bridgeport, called by appellant, testified that he was not familiar with the phrase "standard metropolitan statistical area," and that he did not know "what makes it up" (App. 401). The President of another competitor headquartered in Bridgeport called by appellant, Mr. Stassa, testified as follows:

Question: "But you have never considered the SMSA one way or the other as being your banking market?"

Answer: "No. I think we have our own description of what our market is" (App. 1366).

In its analysis the District Court reviewed the factors affecting marketing decisions by the seller banks including rate competition from all banks in their service areas (since appellee banks were found to price their services on a systemwide basis), the impact of advertising by banks in the service areas, the impact of competition with the much larger Hartford banks in the service areas and the question whether actual or perceived potential competition affected marketing decisions in these service areas (J.S. 21a-24a). Benjamin Blackford, President of State National in Bridgeport, called by appellant, testified that his bank's trading area was his branching area, and that his bank charged the same price for services in all of its branches (App. 401-403).

The District Court found that "the decrease in the number of commercial banks since 1955 has not actually

increased concentration in the State's banking market" (J.S. 93a). The District Court held that both wholesale and retail customers "enjoy substantially greater competitive alternatives [today] than in 1955" (J.S. 94a; *See* App. 2004-2009).

While appellant argues that "[c]onvenience of buyer-seller interaction is the lesson of banking market definition taught by *Philadelphia National Bank* . . ." (Appellant's Brief, at 43), it ignores this test when it suits its own convenience. Because there is no bank in the City of New Haven with which Connecticut National could merge under appellant's standards as an acceptable foothold entry and because Connecticut National is prohibited by law from branching into the City of New Haven, appellant is forced to argue that acquisitions of banks outside the City of New Haven but in the New Haven SMSA constitute entry into the New Haven market even though such banks still could not branch into New Haven. It is for this reason that appellant has been forced to change the position it has previously taken in this Court on the appropriateness of SMSA's as relevant markets.

The evidence showed conclusively, however, that offices of both Connecticut National and First New Haven as well as other banks obtain their business predominantly from the towns in which they are located. Thomas Richardson, President of Union Trust Company, testified that his bank's Trumbull office (in the Bridgeport SMSA) does not compete for corporate business in the Bridgeport area (App. 1161).

Appellant introduced no evidence to show that the majority of customers, for example, at Connecticut National's Fairfield office whose statement addresses are in the Town of Fairfield itself (representing 77.1% of that

office's IPC deposit balances) can practicably turn for supplies to banks throughout the Bridgeport SMSA. Appellant's own exhibit (App. 1519) shows that less than 10% of that office's balances are derived from other towns in the SMSA. In Connecticut National's Trumbull office 83.1% of the IPC deposits are held by Trumbull residents, with only 12.5% originating in other SMSA towns (App. 1520). This pattern is typical of Connecticut National's offices. Nor is the pattern in First New Haven's suburban offices materially different (App. 1535).

Under the circumstances, a so-called toehold acquisition by Connecticut National outside the City of New Haven but within the SMSA would not constitute effective competition with First New Haven in its primary market, the City of New Haven.

The District Court had ample basis to conclude that appellant's proof did not meet the tests of geographic market delineation spelled out carefully in *Philadelphia* and *Phillipsburg, supra.*

Appellant's own expert witness on banking matters, Dr. Murphy, conceded that Stamford, New York City and Norwalk might well all be considered part of the same banking market (J.S. 25a). The record shows that New York banks' television and newspaper advertising affects the competitive pricing of bank services by Connecticut based banks. Dr. Murphy agreed that commuting patterns and the substantial competitive interaction between New York City and Southern Connecticut, supported the conclusion that substantial competition exists for banking business in Connecticut from New York City banks. Appellant's evidence showed that approximately 50,000 heads of households commute into Connecticut from New York or *vice versa* in approximately equal numbers and showed that

this was part of an increasing trend of cross-commutation. The evidence established that in Fairfield County, where Connecticut National is headquartered, the daily circulation of *The New York Daily News* was 44,058 copies and *The New York Times,* 29,360 copies. The circulation of each of these New York papers far exceeds the circulation of Fairfield County's only morning daily, *The Bridgeport Post Telegram,* which averaged 11,521 daily copies. The circulation of the New York papers is approximately six times that of the local paper. The evidence showed that New York banks advertise heavily on television, which saturates Fairfield County, in the newspapers and in the railroad stations. The competitive impact in Connecticut of the advertising of rates on savings deposits and rates charged for loans by New York banks was found by the District Court to be substantial (J.S. 25a).

Fairfield County residents who commute to New York do a substantial amount of banking business in New York City (J.S. 26a-27a). And it has been demonstrated that New York City banks derive vast amounts of business from Connecticut (App. 2351-2353). Appellees did not have the burden of establishing the parameters of total Connecticut business held by out-of-state banks. But it is submitted that, when appellees come forward and establish upwards of $500 million in Connecticut deposit business in over 24,000 accounts held by only six of the over seventy New York City area banking organizations and by four Boston banks, a presumption arises that the unknown balance of Connecticut business going to out-of-state competitors is competitively significant.[27]

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[27] These figures are substantially understated as the largest New York City bank included no savings account data showing Connecticut business and others responded for only some of their offices (J.S. 26a; App. 2353).

Appellant made no effort to rebut this presumption and, in fact, refused to participate in the fact gathering process although invited to do so by the District Court. It prepared all its statewide concentration data on the basis that such existing competition is unworthy of consideration while asking this Court to declare a merger unlawful based largely on its own guess as to what competition may develop in the future.

Evidence offered by appellant itself, however, showed the existence of approximately 50,000 heads of households commuting into Connecticut from New York or *vice versa* (J.S. 25a). Assuming one employed person per household of five, the cross-commuters between New York and Connecticut represent the equivalent of a city of 250,000 persons, larger than either Bridgeport or New Haven. Yet appellant dismisses these facts, based on its own evidence, as competitively insignificant, since it cannot characterize its own evidence as clearly erroneous. The interaction of New York City with banking in Connecticut, and in Fairfield County in particular, has no parallel in any other bank merger case. The notion that Connecticut banks are not affected by this competition defies common sense as well as the record in this case.

In an attempt to exclude from consideration the influence of New York City area banks on the market, appellant misapplies this Court's "realistic" approach fashioned in *Philadelphia* which calls for a "workable compromise" that avoids the extremes of "drawing the market either so expansively as to [take into account only the] largest bank customers", or "so narrowly as to place appellees in differ-

ent markets, because only the smallest customers are considered." [28] Of course, unlike the Philadelphia National and Girard Trust banks, appellees here serve different areas.

This Court's analysis in *Philadelphia* is a dual test, which takes into account both the areas "in which the seller operates *and to which the* [intermediate-size] *customer can practicably turn for supplies.*" 374 U.S. at 359. The record before this District Court presented a complex application of this test; that is, many of the "smallest" customers in Connecticut National's service area, whether they commute to New York or not, "can practicably turn for supplies" to the New York City area where the largest banks in the country are located and from which such banks exert forceful competitive influences on the quality and rates of banking services in Connecticut through newspaper and television advertising. New York City banks clearly "operate" throughout the State of Connecticut. Their extensive marketing efforts are described in the findings of the District Court (J.S. 25a-27a).

Moreover, Connecticut's banking customers of a size well below the *Philadephia* Court's description of the "largest customers" have reasonable access to the New York City area banks at least equal to that of the commuter. Appellees' position, accordingly, is that a "workable compromise" should not exclude the influence of banks in an area to which many of the state's "smallest" customers can and do practicably turn for supplies and to which the medium-sized customers have ready access.

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[28] 374 U.S. at 361.

B. *The State of Connecticut Is the Relevant Section of the Country.*

Appellees agree with appellant that the State of Connecticut comprises a relevant geographic market. They do not agree that the proposed merger will eliminate substantial direct competition within it nor that it will have any of the effects proscribed by Section 7 of the Clayton Act. Nor do they agree that the Connecticut market can be isolated from the influences of banks located outside it but which operate within it and are conveniently available to a substantial portion of residents and businesses in Southern Connecticut. The fact is that within that relevant geographic market even a generous view of appellant's evidence does not prove a substantial lessening of competition.

The two dominant Hartford banks operate on at least a statewide basis and each has a limited purpose trust office in New York City. But it is conceded that First New Haven and Connecticut National do not operate statewide. Banks in Southern Connecticut operate under the influence of the two Hartford banks but are presently unable to compete in return in Hartford. If appellant is successful in this case, First New Haven and Connecticut National will be permanently relegated to the local markets they now serve. The record also demonstrates that just as banks in Southern Connecticut compete in the shadow of the dominant Hartford banks, the entire State of Connecticut is subject to the pervasive competitive influence of the New York City banks.

The court below had before it the following facts in arriving at the conclusion that the State as a whole is the relevant section of the country in which to test the

competitive effects of the proposed merger; appellant concurred that the State was a relevant section of the country (J.S. 21a-24a); on the supply side, banks in Connecticut price their services on a systemwide basis so that their competitive behavior is influenced by every other bank operating in its service area including New York and Boston banks (J.S. 21a); appellant's expert concluded that a customer for a medium-sized ($50,000) loan would not confine his shopping to any particular SMSA (see note 26 *supra*, p. 37); for some services, such as international transactions, computer services and municipal financing, medium-sized customers are forced to patronize New York City banks and the two big Hartford banks, although these customers would prefer to use appellees (J.S. 73a-78a); and, the State is the area within which Connecticut headquartered banks may branch, subject to the home office protection statute.

C. *Connecticut's Cities and Towns Are the Appropriate Units of Analysis for Determining the Effects of the Merger on Potential Competition.*

Contrary to appellant's claim, appellees have never argued that individual towns are relevant sections of the country in this case, although a town obviously can be a relevant section of the country as this Court held in *Brown Shoe, supra* (Appellant's Brief, at 44). Appellees' position has been consistently (and the objective criteria for ranking potential entrants were prepared on the basis) that the city or town is the appropriate unit for analysis of the effect of the proposed merger on potential competition. Dr. Peck, in whose expert opinion the District Court concurred (J.S. 28a), selected individual towns as the appropriate unit for analysis for the reasons that

"[f]irst, in Connecticut the bank regulatory laws are written around towns rather than some other unit" and "[s]econd, banking is an industry in which convenience plays a major role" (App. 767-768). Dr. Peck did consider using the entire State as the unit for analysis but concluded that that would lead to the result that any banker in the State would be "concerned about an entry of any other bank anywhere in the State . . ." which he rejected as unrealistic (App. 769).

Dr. Peck also considered whether the SMSA would be an appropriate unit for analysis of the competitive effects of the proposed merger. The District Court concurred in his analysis in finding that "the SMSA is not an appropriate area [in which] to assess potential competition" (J.S. 28a).[29] The District Court concluded that for purposes

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[29] Professor Peck testified as follows:

"Q. Did you give any consideration to using the standard metropolitan statistical areas as geographic units of analysis? A. Yes, I did. I concluded, however, it was not the appropriate unit.

Q. Why? A. For the analysis of potential competition.

Recall that the emphasis is always on how the bankers in a community—the competitive pressures exerted by the threat of entry.

Now, if you take two towns in the same standard metropolitan statistical area, Woodbridge and Guilford, it seems to me that a banker in Woodbridge would not be very concerned about a new entrant into Guilford. For one thing, there is 45 minutes to an hour's driving time that separates them. For another, there are seven banks with 39 offices in the towns between Woodbridge and Guilford.

Yet, these two towns are in the same standard metropolitan statistical area.

It seems to me with that kind of situation, a Woodbridge banker would not be very concerned about an additional bank coming into Guilford when he first recognizes the driving time and second recognizes the fact that if depositors are not very interested in a nearby location, they already have a substantial number of alternatives in the towns that intervene" (App. 768-769).

of analyzing the proposed merger's effect on potential competition, the only appropriate unit for analysis is the town, although it is not a relevant section of the country in this case or a banking market because it was not proven by appellant to be the area in which sellers operate or in which customers which are neither very large nor very small can practicably turn for supplies.

II.

Savings Bank Competition in Connecticut

The District Court's findings on the issue of the effect of the proposed merger on potential competition relied upon Professor Peck's analysis which was limited to commercial banks and did not include savings banks in the line of commerce (J.S. 29a). Thus, Professor Peck's testimony and the analysis of the court below assumed, *arguendo,* that commercial banking is the appropriate line of commerce in Connecticut. However, the District Court did not conclude as a matter of law that the appropriate line of commerce should be limited to commercial banking.

In attacking the conclusions of the court below with respect to the relevant section of the country, appellant complains that the court incorrectly applied a seller-oriented analysis. In its attack on the District Court's findings on the line of commerce issue appellant complains of error on the ground that the court below focused on *customer* banking alternatives in holding that "savings banks are in direct and substantial competition with commercial banks in providing *product-services to the banking consumers in Connecticut.*" (emphasis added) (J.S. 85a).

It is appellees' view that this Court's opinions in *Philadelphia* and *Phillipsburg* do not require a District Court to ignore competition where competition in fact exists, particularly where, as here, appellant is asking the Court to hold unlawful a merger based upon the mere possibility that appellees will enter each other's markets. Appellees are of the view that in determining whether the effect of a merger "may be substantially to lessen competition" it is at least as relevant to consider competition which exists as that which may or may not in the future come into existence. Appellant called only four witnesses, three during its case in chief and one on rebuttal. All three witnesses called by appellant who testified on the subject agreed that, in Connecticut, savings banks were substantial direct competitors of commercial banks (J.S. 11a-13a; App. 404-408; 1367). The fourth witness called by appellant was not qualified as a banking witness and was not asked the question.

Appellant's banking economist, Dr. Murphy, has stated that "some reconsideration of the commercial bank product line specification may be in order" since *Philadelphia* was decided by this Court because of "increased competition among commercial banks and thrift institutions for savings type liabilities in the 1960s" (App. 157). This was especially important, Dr. Murphy wrote, "if [mutual savings banks] are successful in obtaining the demand deposit privilege in several of the states in which they are permitted to operate . . ." (App. 2326). This statement is in accord with appellees' view and does not imply that *Philadelphia* was incorrectly decided. The reality is that the extent of competition between commercial banks and savings banks has dramatically increased since the close of the record in the *Philadelphia* case in 1962. No-

where has the degree of such competition become more intense than in Connecticut. Even if this case involved two commercial banks headquartered in Bridgeport—the kind of direct competition which existed in *Philadelphia, Nashville,* and *Phillipsburg, supra*—and which does not exist here—it would be unrealistic to ignore the fact that savings banks in Connecticut are now strong competitors and will compete for all retail banking customers (over 90% of appellees' accounts) by 1975. See page 58, *infra.*

At trial appellant failed to offer any proof on the line of commerce issue, reflecting its view that it is no longer necessary in a bank merger case to consider the size, scope or functions of competing sources of financial services in light of this Court's decisions in *Philadelphia* and *Phillipsburg.* If savings banks had every power of commercial banks in Connecticut in addition to all the powers a retail banking customer requires, appellant would apparently still be of the view that it no longer has any line of commerce burden of proof in a bank merger case.

However, no decision of this Court has directed lower courts totally to ignore *existing* competition from financial institutions other than commercial banks in evaluating the importance of *potential* competition in a commercial bank merger case. Appellant argues here that this Court should declare unlawful a merger which it alleges, but failed to prove, may eliminate *potential* competition between the two banks while asking the Court to ignore proven *existing* competition which both banks now encounter from savings banks for 75% of their loan business. Even if this Court should find that commercial banking is the appropriate line of commerce in this case,

contrary to what the evidence has established, it would be illogical and at odds with the Court's prior decisions to ignore the impact of both present and potential savings bank competition on competitive behavior *within* a commercial banking line of commerce, particularly where it is apparent, on appellant's theories, that savings banks now at least stand "in the wings" as full line retail banking competitors and are certain to be on center stage by year-end 1975.

In this appeal, the Court is being asked by appellant to speculate that appellees will find their way around the law and policy of the State of Connecticut and enter each other's markets at some time in the future, contrary to the record and the findings of the District Court. It asks the Court to conclude that the effect of the elimination of that possibility "may be substantially to lessen *competition,* or to tend to create a monopoly" while at the same time it asks the Court totally to ignore retail banking competition where it now exists merely because it goes under a different name. To do so would be almost as unrealistic as ignoring competition between national banks and state banks merely because they operate under different supervisory agencies and may have somewhat different powers. This Court has refused to follow similar suggestions in prior cases such as *United States* v. *Continental Can Co.*, 378 U.S. 441 (1964).

The record is clear that savings banks in Connecticut are direct competitors of commercial banks for time and savings deposits, personal loans and real estate loans as well as for branch sites and personnel (J.S. 11a). By year-end 1975 they will be able to accept demand deposits and offer personal checking account services. Appellant's

expert witness agreed that such competition exists (J.S. 12a). Of the merging banks' total IPC deposit accounts, approximately half presently consist of accounts for which Connecticut savings banks are direct competitors (App. 2220-2225). By year-end 1975 appellees will compete with savings banks for over 90% of their deposit accounts.[30] Appellant admits that over three-quarters of Connecticut National's total loan portfolio consists of personal and real estate loans obtained in direct competition with Connecticut savings banks (Appellant's Brief, at 24 n. 29).

Total deposits of Connecticut savings banks at year-end 1971 amounted to $6.1 billion, substantially in excess of the total deposits of Connecticut commercial banks—$5.7 billion at the same date (App. 2361, 1550-1551). Two of the state's savings banks, moreover, are larger than all but the two dominant Hartford commercial banks and are far larger than either of appellee banks (App. 2257; 1550).

With these facts on record, it is instructive to compare the data available to the District Courts and to this Court in the *Philadelphia* and *Phillipsburg* cases which led to the conclusion that the cluster of products and services offered by commercial banks in Pennsylvania and New Jersey comprised a distinct line of commerce.

For Pennsylvania as a whole, commercial banks held $13.7 billion of the $15.7 billion held by all Pennsylvania commercial and savings banks.[31]

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[30] In *Philadelphia*, commercial banking was the line of commerce because "[s]ome commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; *the checking account is in this category.*" 374 U.S. at 356 (emphasis added).

[31] Federal Reserve Board, *Distribution of Bank Deposits by Counties and Standard Metropolitan Areas*, December, 1960.

Based on figures for mid-year 1960[32] (the period on which the trial record in *Philadelphia* was built) commercial banks held $4.5 billion of the $6.3 billion of total deposits of commercial banks and savings banks in the four-county area adjudged the relevant geographic market in *Philadelphia* and savings banks in Philadelphia did not make personal loans nor offer checking accounts.

In the Phillipsburg-Easton area, held to be the relevant geographic market in *Phillipsburg,* no savings bank competition existed as of June 29, 1968, while total commercial bank deposits in the Allentown-Bethlehem-Easton metropolitan area were reported by the FDIC to amount to $1.1 billion at the same date. For the State of New Jersey as a whole, commercial banks held $12.2 billion of the $14.7 billion in deposits of all state commercial and savings banks in June, 1968.[33]

The relative immunity from savings bank competition described in *Philadelphia,*[34] is totally inapplicable to Connecticut. Defendants' Exhibit 52 (App. 2288) shows that savings banks in Connecticut realized net gains in savings of $4.77 billion from 1950-1971 as compared to net

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[32] *Id.*

[33] Federal Deposit Insurance Corporation, *Summary of Accounts and Deposits in all Commercial Banks,* New York FDIC District; *id.* Philadelphia FDIC District, June 29, 1968; *Summary of Accounts and Deposits in all Mutual Savings Banks,* FDIC, June 29, 1968. Appellant now suggests in note 27 of its brief at page 22, that while there were no savings banks in the relevant area, there were savings and loan associations which "in each state had savings capital in excess of $5 billion." But these savings and loan associations did not make personal loans and were not as of the record dates in those cases empowered to accept demand deposits and issue checking accounts by a fixed date.

[34] 374 U.S. at 356-357.

gains of $1.86 billion in savings at Connecticut commercial banks. This fact demonstrates that savings banks have been nearly three times as effective as commercial banks in competing for new savings deposits during this period.[35]

In none of the cases decided by this Court have savings banks occupied a position comparable to that in Connecticut where they have more deposits and loans than commercial banks and where they compete directly for the bulk of commercial banks' deposit and loan business. The record amply supports the conclusion that "banking" in Connecticut is the relevant line of commerce—including savings banks as well as commercial banks.

The differences between banking market realities today and those under analysis in *Philadelphia* and *Phillipsburg* led appellant's chief witness to conclude that, since this Court's decision in *Philadelphia*, economic evidence indicates a change in the amount of competition between savings banks and commercial banks (App. 158). He stated in the Summer 1971, *Journal of Bank Research* at page 18:

> . . . That is, even if an analysis of competition in each bank activity was undertaken in the years prior to the Supreme Court decision [in *Philadelphia*] the evidence over that period does not strongly support the

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[35] As shown at App. 2362, the percentage share of total savings held by Connecticut savings and commercial banks fluctuated during the five years prior to trial as follows:

Year-end	Savings Banks	Commercial Banks
1967	58.9	22.2
1968	58.2	23.2
1969	59.2	22.2
1970	59.0	22.5
1971	59.7	21.8

> hypothesis that commercial bank time and savings deposits were close substitutes for MSB [Mutual Savings Bank] deposits and S&L shares. Thus, the Court's finding was not inconsistent with the statistical evidence of the 1950s. However, increased competition among commercial banks and thrift institutions for savings-type liabilities in the 1960s suggests that some reconsideration of the commercial bank product line specification may be in order. This is especially important if MSBs are successful in obtaining the demand deposit privilege in several of the states in which they are permitted to operate and S&Ls make use of the capability to make third-party transfers

(App. 2361).

Even if the issue in this case were the elimination of actual competition, the evidence justifies the conclusion that "banking" is the appropriate line of commerce in which to assess effects of the proposed merger on competition.

However, this is not an actual competition case, but, as appellant concedes, a potential competition case.

It is now the law in Connecticut that, no later than December 31, 1975, savings banks in Connecticut will have the power to accept demand deposits and offer personal checking accounts. By 1976 the competitive arena in Connecticut will include savings and commercial banks offering all of the important retail banking services: savings and checking accounts, real estate loans, personal loans for a wide variety of purposes and passbook loans. For almost all retail customers both savings and commercial banks will offer the cluster of services that permits one-stop banking.

Nor can appellant argue that savings banks will not take advantage of their new power to offer personal checking

accounts. The two savings bank officials who testified at trial stated that their banks would offer checking accounts if empowered to do so, and one such official stated that his bank had already made extensive studies of how to implement demand deposit services (App. 1017, 1071). Appellant claims that the experience of savings banks in offering checking accounts in Maryland and New Jersey suggests that Connecticut savings banks will be ineffective competitors for checking accounts.[36] The thinness of this argument is exposed by comparing the number of banks and their total deposits in the three states involved at year-end 1971 as follows:[37]

	No. of Savings Banks	Savings Banks Deposits ($ Millions)	No. of Commercial Banks	Commercial Bank Deposits ($ Millions)
Maryland	5	977	112	5,978
New Jersey	20	3,622	207	17,068
Connecticut	68	6,094	60	5,682

As this Court said in *Brown Shoe,* the relevant product market in a Section 7 merger case "must be drawn with sufficient breadth to include competing products of each of the merging companies and to recognize competition where, in fact, competition exists." 370 U.S. at 326. In a potential competition case, the District Court was clearly justified in recognizing competition where, in fact, competition exists and in taking into account competition certain to grow stronger in the immediate future.

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[36] Consistent with its practice of refraining from offering evidence to support many of its assertions in this case, appellant did not call any witnesses who so testified.

[37] App. 2255, 2262; Polk & Co., *Polk's World Bank Directory* (March, 1972) VIII.

By focusing solely on commercial banks' power to make commercial loans and accept commercial demand deposits[38] and neglecting the convenience and banking needs of the far greater number of individual retail customers, appellant urges application of the wrong standard. It is the retail customers whose banking needs are most localized. Appellant argues that *Phillipsburg* compels a result contrary to that reached by the court below. But in *Phillipsburg* this Court relied on the immense importance to retail customers of one-stop banking in determining the appropriate line of commerce:

> For some customers, full-service banking makes possible access to certain products or services that would otherwise be unavailable to them; the customer without significant collateral, for example, who has patronized a particular bank for a variety of financial products and services is more likely to be able to obtain a loan from that bank than from a specialty financial institution to which he turns simply to borrow money.
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> A customer who uses one service usually looks to his bank for others as well, and is encouraged by the bank to do so. Thus, as was the case here, customers are likely to maintain checking and savings accounts in the same local bank even when higher savings interest is available elsewhere. This is perhaps particularly true of banks patronized principally by *small depositors and borrowers for whom the convenience of one-stop banking and the advantage of a good relationship*

[38] Contrary to appellant's statement that the record establishes that "savings banks in Connecticut do not compete with commercial banks for commercial loans" (J.S. 16 & n. 21), the record shows savings banks with $26 million of such loans at year-end 1971 (App. 630-631, 2030). It is also a fact that many mortgage loans made by savings banks are to business enterprises who use the proceeds for commercial purposes (App. 479, 487-488).

with the local banker—and thus of favorable consideration for loans—are especially important.

(citations omitted) 399 U.S. at 360-1 (emphasis added).

Customers in Connecticut are likely to maintain checking and savings accounts in the same local bank and will be able to do so by year-end 1975 in either a savings or commercial bank. A customer without significant collateral can now turn to either a commercial or savings bank for a personal installment loan. A savings bank in Connecticut is not a "specialty financial institution to which (the depositor) turns simply to borrow money." For the retail customer a savings bank and a commercial bank will be equally useful alternatives to which he can turn for the convenience of one-stop banking and the advantage of a good relationship with the local banker. Indeed full-service retail banking in both commercial and savings banks will be uniquely available to Connecticut's banking public.

It is somewhat anomalous for appellant to argue on the one hand that some of the benefits resulting from a bank merger such as increased lending limits, international transactions, sophisticated computer services and corporate and municipal financing services are "not important to the great bulk of bank customers in the area" because it is "the great bulk of customers who make up the community whose convenience and needs the merger is supposed to serve" (J.S. 30-31), while asking this Court to ignore the fact that it is the great bulk of bank customers in the State of Connecticut who are and will be the beneficiaries of the savings and commercial bank competition. For the great bulk of bank customers—the retail bank customers—interchangeability of use and cross-elasticity of demand compelled the District Court to conclude that the appropriate line of commerce includes savings and commercial banks.

As appellant's own exhibits (App. 1513, 1528) show, 95% of the demand deposit accounts at the main offices of appellee banks are below $10,000 in size. Clearly, savings banks will be competitive for the bulk of these accounts. (J.S. 17, n. 24) asked this Court to decide the line of commerce issue on the basis of the dollar volume of accounts held by less than 1% of the account holders at appellee banks' main offices set forth in such exhibits. Appellant now in its brief (at 27, n. 36) renews the request on the basis of the dollar volume of accounts held by an additional 4% of appellees' customers reflected in such exhibits.

These same accounts are demonstrated by the record to be subject to intense competition from New York banks. It is thus a strange line of commerce which appellant claims in this case where over 90% of the accounts in the line of commerce are retail accounts which are now or will be by the end of 1975 subject to direct competition from savings banks and where the balance of the accounts in the line of commerce are now subject to direct competition from New York banks. Appellant asks this Court to ignore all of this existing competition in pursuit of its potential competition theories.

Whether one views the line of commerce as all banking services offered in Connecticut, thus recognizing the realities of existing competition from Connecticut savings banks and New York commercial banks, or as a "commercial banking" line of commerce in which the impact of existing and potential competition from Connecticut savings banks and New York commercial banks is recognized is merely a matter of expression if competition is to be recognized where competition in fact exists.

In sum, well over 90% of the purchasers of banking services in Connecticut can or will be able practicably to turn to both commercial and savings banks for supplies. The advent of full service one-stop retail banking at either type of bank correctly led the court below to conclude that "banking" is the appropriate line of commerce in which to assess the competitive effects of the proposed merger. In any event whether this Court concludes that "banking" or "commercial banking" is the appropriate line of commerce need not be determinative in a case where appellant has failed to prove any of the prohibited effects under Section 7 of the Clayton Act no matter how narrowly or broadly the product market is defined. *U.S.* v. *General Dynamics Corporation, supra.*

III.

The Potential Competition Doctrine as Developed in Economic Theory[39]

A. *The Theoretical Literature.*

Economic theory has historically treated the condition of entry as an important aspect of market structure. The analysis of potential competition has been elaborated and extended in the economic literature since the late 1950's.[40]

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[39] The views expressed in this section of appellees' brief on economic issues are those of Professor Merton J. Peck, as well as those of appellees.

[40] Joe S. Bain, *Barriers to New Competition* (Cambridge: Harvard University Press, 1956); Paolo Sylos-Labini, *Oligopoly and Technical Progress* (translated from the Italian by Elizabeth Henderson; Cambridge: Harvard University Press, 1962); Franco Modigliani, "New Developments on the Oligopoly Front," *Journal of Political Economy*, June 1958, pp. 215-232; Roger Sherman and Thomas D. Willett, "Potential Entrants Discourage Entry,"

This literature points out that even in highly concentrated markets, prices and profits may approach competitive levels if the sellers are concerned that higher prices and profits would attract one or more entrants. The competitive constraint on pricing in these markets, then, is the possibility of entry and, more generally, potential rather than actual competition. The importance of potential competition depends on the significance of barriers to entry; if entry is difficult (or expensive), then the competitive constraint from potential competition is weak and could be less significant than the constraints of actual competition even in a highly concentrated market. Potential competition is an important determinant of market behavior only if actual competition is weak (approximated in the economic literature by high concentration) and entry is not precluded by high barriers to entry. Since the effects of barriers to entry vary from firm to firm, some firms are highly likely entrants and others are not.

In assessing the competitive effects of mergers, the analysis of potential entry is only relevant if the merger takes place in a market where potential competition is important relative to actual competition. A merger between an actual competitor in such a market and a potential competitor could have an impact on the over-all level of competition only when the potential entrant is one of the most likely entrants among a small number of potential entrants. If

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Journal of Political Economy, August 1967, pp. 400-403; and B.P. Pashigian, "Limit Price and the Market Share of the Leading Firm," *Journal of Industrial Economics*, July 1968, pp. 165-177. For other citations, see D.K. Osborne, "The Role of Entry in Oligopoly Theory," *Journal of Political Economy*, August 1964, pp. 396-402.

there are at least several potential entrants, the loss of one obviously is less likely to have a discernible competitive effect. Similarly, if even a small number of more likely entrants remains, the loss of a less likely entrant will not affect competition in the market. Nothing in the economic literature indicates that the loss of one among a number of potential entrants has any discernible competitive effect.

As the preceding discussion demonstrates, the theory of potential competition cannot be read to support the argument that the merger of any actual competitor with any possible entrant will have an adverse impact on competition. Rather the theory is a precisely articulated set of propositions which lead to the conclusion that a merger between an actual and potential competitor is likely significantly to affect competition, if and only if, all the following conditions are met:

1. Actual competition is weak. This is usually approximated in the crude version of the theory by high concentration among the actual competitors.
2. Entry is easy enough, for at least some entrants, that the competitive constraint provided by potential competition on actual competitors is a realistic one.
3. The merger eliminates one of a few very likely potential entrants.

B. *Concentration and Actual Competition.*

Economists often use the concentration ratio as a shorthand indication of the state of actual competition. However, the reliability of concentration ratios as measures of actual competition depends upon whether or not all the economically significant options for buyers and sellers are

included in the market.[41] National markets, for example, may be insulated from significant foreign competition so that it may be reasonably accurate to assume that high concentration indicates that actual competition is weak. In narrowly defined geographical and product markets, actual competition may be strong even though concentration is high because buyers can find closely similar products or nearby suppliers of the same products which have not been included in the market used for computing the concentration ratio. Thus, defining markets narrowly tends to dilute the significance and reliability of concentration ratios as indicators of actual competition.

The significance of concentration as a measure of actual competition in local commercial banking markets, particularly in Connecticut, is diluted because two important competitive influences are not reflected in such concentration ratios.

First, concentration ratios in local commercial banking markets do not reflect the competitive influences on pricing of bank services from commercial banks outside the local market. An economist would be led to examine the role of these external sources particularly when firms located outside the local market advertise in it and when there is substantial cross-commutation in and out of the area. When depositors learn from the newspapers, radio or television what interest out-of-town banks are paying for savings deposits or charging on automobile loans, or can deposit their savings or make the loan in a bank near

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[41] For a discussion of concentration ratios and their limitations as measures of competition see articles by Miller, J. P., Rosenbluth, G. & Scitovsky, T., *Business Concentration and Price Policy* (1957).

their place of business, an economist would conclude that such influences would be likely to affect pricing behavior by local banks. For example, it is clear to an economist that newspaper, television and radio advertising in Connecticut by New York banks is likely to influence the competitive behavior of banks in Connecticut. Similarly, solicitation of business loans and deposits by New York banks from Connecticut firms on the scale demonstrated in the record in this case influences the competitive behavior of Connecticut banks.

Second, concentration ratios in local commercial banking markets ignore services provided by other financial institutions which are substitutes for those offered by commercial banks. For example, savings banks in Connecticut provide alternative sources of credit for personal loans up to $5,000 as well as mortgage loans. By year-end 1975 savings banks will be able to accept demand deposits and offer checking accounts. For these services savings banks are reasonable alternatives to commercial banks. Thus the influence of savings banks on the competitive behavior of commercial banks should be considered in evaluating the significance of concentration ratios among commercial banks as measures of actual competition.

The presence of these two competitive influences also dilutes the importance of the possibility of entry by commercial banks into any locality. Potential competition is significant when it limits the prices or influences the services of actual sellers because of their concern with entry of additional actual competitors. The outside influences enumerated above can be a more significant constraint on pricing and a greater pressure for better service than those imposed by the concern of existing sellers over the entry of new competitors. The record in this case indi-

cates the presence of these competitive influences and these seem more important than the potential competition from the entry of additional commercial banks in local banking areas.

C. ***Ease of Entry and Potential Competition.***

The second condition which must be fulfilled in order to make potential competition relevant for analyzing the competitive effects of a merger is that entry is easy enough so that the competitive constraint provided by potential competition on actual competitors is a realistic one.

The literature on potential competition deals with industries in which the barriers to entry are for the most part financial and economic rather than legal. In banking, however, legal barriers are an important factor, for Connecticut Home Office Protection legislation exists which prevents *de novo* branching and surmounting this barrier by holding company formation has never been attempted. Thus, entry *de novo* is at least substantially impeded by Connecticut law.

Similarly, it is impossible to enter New Haven through a merger with a bank small enough to qualify as a toe-hold acquisition. In the City of New Haven, at least, there appears to be no "smaller firm" of significantly different size whose acquisition by Connecticut National would be substantially more procompetitive. The suburban banks noted by appellant as toehold acquisition prospects for Connecticut National are, of course, prohibited from branching into the City of New Haven.

In the City of Bridgeport there are two small banks which in theory would qualify as toe-hold acquisitions.[42] However,

[42] *See*, however, pp. 82-83, *infra*.

it is questionable whether First New Haven is a likely entrant into that city under any circumstances which indicates that the second condition under which potential competition is important in evaluating a merger is not met in this case.

D. *The Impact of Merger on the Supply of Potential Entrants.*

The third condition is that the merger eliminates one of a few very likely potential entrants. In its home office City of New Haven, First New Haven faces the three largest banks in the State. Its profits have been declining and its economic incentives to enter the City of Bridgeport are questionable. It is at least plausible to an economist that First New Haven would not choose to enter the City of Bridgeport when that would mean encountering one of the two largest banks in the State, as well as three other commercial banks and one savings bank, all larger than itself, and when the largest bank in the State, Hartford National, is a far more likely entrant. It is more than plausible that the elimination of First New Haven as a possible entrant into the City of Bridgeport would have no effect on competition in that city at all, actual or potential.

The third condition—whether the merger eliminates one of only a few likely entrants—was also investigated statistically for each of Connecticut's 165 towns affected by potential entry. The town is used for analysis of entry and potential competition because Connecticut laws regulate entry on that basis and actual competition, depending as it does on convenience, requires nearby location of effective competitors. This is not inconsistent with the proposition that influences on interest rates or services can be provided by larger banks outside the town, so that the geo-

graphic unit for the analysis of entry is different than the relevant market.

By way of summary, it should be noted that from the standpoint of an economist, all three of the above conditions of entry must be met before a proposed merger would be likely to adversely affect the structure of potential competition. While it is not the role of an economist to evaluate the evidence in an antitrust merger case, the conclusions of the District Court in this case on the subject of potential competition seemed to be economically supportable.

IV.

The Potential Competition Doctrine as Applied by This Court

In *Falstaff*, this Court remanded the case to the District Court "to determine whether in any realistic sense Falstaff could be said to be a potential competitor on the fringe of the market with likely influence on existing competition" 410 U.S. at 534. It left "for another day the question of the applicability of §7 to a merger that will leave competition in the market place exactly as it was, neither hurt nor helped, and that is challengeable under §7 only on grounds that the company could, but did not, enter *de novo* or through 'toe-hold' acquisition and that there is less competition than there would have been had entry been in such a manner" 410 U.S. at 537.

In his concurring opinion, Mr. Justice Marshall classified the modes of potential competition into three categories: (1) the dominant entrant having "overpowering resources which, if brought to bear within the market, could ulti-

mately have a substantial anticompetitive effect", 410 U.S. at 558; (2) the perceived potential entrant whose removal "from the fringe of the market has a present anticompetitive effect" because the threat of its entry "if entry barriers are lowered, may deter anticompetitive conduct within the market", 410 U.S. at 559; and (3) the actual potential entrant at the fringe of the market which "exerts no present procompetitive effect" but whose "entry by acquisition may end for all time the promise of more effective competition at some future date", 410 U.S. at 561.

We discuss these issues in turn as they may be applied to this case.

A. *The Dominant Potential Entrant.*

(1) In the City of New Haven the existing commercial bank competitors include Hartford National with assets of $1,791 million, CBT with assets of $1,681 million, and Union Trust with assets of $720 million as of year-end 1973. The two larger banks are five times as large as First New Haven and Union Trust is more than twice as large. There are two savings banks in New Haven larger than First New Haven which now provide actual competition for two-thirds of its loans and will provide actual competition by year-end 1975 for all of its retail banking business.

This Court in *Falstaff* has stated that in *Ford Motor Co.* v. *United States,* 405 U.S. 562 (1972) and *FTC* v. *Procter & Gamble Co.,* 386 U.S. 568 (1967) the acquisition of a company within a relevant market by a firm outside the market with overpowering resources "could drive other marginal companies out of business, thus creating an oligopoly, or it might raise entry barriers to such an ex-

tent that potential new entrants would be discouraged from entering the market" *Falstaff*, 410 U.S. at 558.

Analogizing Connecticut National to the "acquiring firm" in this example, it can in no sense be characterized as "dominant." Ford Motor Company ranked in 1972 among the four largest industrial firms in the United States with resources in excess of $11 billion. Procter & Gamble Co. is among the twenty largest industrial companies in the United States with resources in excess of $3.5 billion. Connecticut National ranks 208th among commercial banks in the United States,[43] fourth among commercial banks in Connecticut, sixth among all banks in Connecticut and is smaller than three commercial banks now in New Haven.

(2) In the City of Bridgeport, Connecticut National with assets of $472 million competes with CBT, with assets of $1,681 million, with State National Bank whose assets were $447 million as of year-end 1973 and which had combined assets with its parent, the S & H (Green Stamps) Company as of year end 1972 of about $1 billion, and with City National Bank which had $445 million of assets all as of year-end 1973. In Fairfield County, Connecticut National competes with Hartford National, over four times its size.

First New Haven, the claimed potential entrant into Bridgeport, with assets of $339 million ranks below the three hundred largest commercial banks in the United States, eighth among commercial banks in Connecticut, and thirteenth among all banks in Connecticut. There are four commercial banks with offices in the City of Bridgeport larger than First New Haven and a savings bank three times as large. There are two *additional* commercial banks in New Haven with which First New Haven competes

[43] *American Banker*, Feb. 15, 1974 at 109.

which are over five times and twice as large, as well as the two additional larger savings banks previously noted. There are, altogether, six different commercial banks in either New Haven or Bridgeport which are larger than First New Haven.

Even appellant does not suggest that Connecticut National or First New Haven fits the rubric of a dominant potential entrant "having overpowering resources which, if brought to bear within the market, could ultimately have a substantial anticompetitive effect." *Falstaff*, 410 U.S. at 558.

B. *The Perceived Potential Entrant.*

Appellant's entire proof on the perceived potential entrant issue consists of the following colloquy between counsel and Dr. Murphy, its banking economist.

> Q. . . . is there another beneficial effect which is related to potential competition? A. Yes. In general, we think in terms of a—if a concentrated market exists with a strong potential competitor capable of entering, that in these cases the participants in the concentrated market may find it to their advantage not to exercise their market power. That is, the threat of an entrant in the so-called—in the wings, the wings effect, could conceivably affect their behavior in such a way that they may have—[the] outcome would be more like a less concentrated market.
>
> Q. You are saying that the mere existence of this potential competitor has some effect? A. Yes, it could have some effect. Right.

(App. 155-156).

See also (App. 363):

> . . . a competitor in the wings will tend to have a desirable effect, within a market area, within some market area, if it's not presently operating there.

Appellant demonstrated its familiarity in this exchange with the "perceived effects" or "wings" theory of potential competition. The reason it offered no evidence on the issue, as distinguished from an articulation of the theory, is that despite its extensive discovery and interviews of numerous prospective witnesses in Connecticut such evidence was, apparently, unavailable. Appellant called as witnesses two bankers from Bridgeport, its only witnesses other than a regional economist and a banking economist, but did not inquire of these witnesses whether they perceived First New Haven to be a potential entrant into Bridgeport, nor did appellant attempt to adduce such evidence by way of direct or cross-examination of the nine banker witnesses and eight business witnesses from both New Haven and Bridgeport called by appellees. The inference is strong that none of these witnesses would have testified that they perceived either First New Haven or Connecticut National to be a potential entrant into the other's home office cities or the respective SMSA's, for that matter. In any event, it was certainly appellant's burden to come forth with such evidence, and no matter what the reason, it did not.

It is noteworthy that in the *Falstaff* case on remand appellant entered into the following stipulation on July 10, 1973:

> IT IS HEREBY STIPULATED AND AGREED by the parties that in compliance with the mandate of the Supreme Court in *United States* v. *Falstaff Brewing Corporation*, slip opinion No. 71-873, decided February 28, 1973, the parties will submit to this Court proposed findings of fact drawn from the existing record before this Court, with conclusions of law and supporting briefs, bearing on the proper assessment of Falstaff as a potential competitor consistent with the aforesaid opinion of the Supreme Court.

The *Falstaff* stipulation lends support to the notion that when a litigant has relevant evidence, it will be adduced and that when a litigant does not offer evidence on an issue it is usually because it is unavailable. In the present case, appellant failed to adduce any evidence that either of appellees is a perceived potential entrant and the District Court found that they were not (J.S. 56a).

C. *The Actual Potential Entrant.*

This leaves the question whether First New Haven or Connecticut National are "actual potential entrants" into each others' home office cities or other towns comprising their respective service areas. As Mr. Justice Marshall has said:

> Obviously, the anticompetitive effect of such an acquisition depends on the possibility that the firm would have entered *de novo* had it not entered by acquisition. If the company would have remained outside the market but for the possibility of entry by acquisition and if it is exerting no influence as a perceived potential entrant, then there will normally be no competitive loss when it enters by acquisition. *Indeed, there may even be a competitive gain to the extent that it strengthens the market position of the acquired firm.*[44]

It has been suggested in *Falstaff*[45] that this Court has already decided that such an acquisition would be unlawful in *United States* v. *Continental Can Co., supra.* This conclusion has not been accepted by a majority of the Court although "traces of this view" have been observed in *Ford*

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[44] *Falstaff*, 410 U.S. at 561 (emphasis added).

[45] *Id.* 410 U.S. at 537 n. 14.

Motor Co. v. *United States, supra; FTC* v. *Procter & Gamble, supra; United States* v. *Penn-Olin Chem. Co.*, 378 U.S. 158 (1964); and possibly *United States* v. *El Paso Gas Co.*, 376 U.S. 651 (1964).

As Mr. Justice Marshall, concurring in *Falstaff*, said, "Obviously, the anticompetitive effect of such an acquisition (by an actual potential entrant) depends on the possibility that the firm would have entered *de novo* had it not entered by acquisition" 410 U.S. at 561. Appellant had the burden of proving that Connecticut National would have entered New Haven *de novo* or that First New Haven would have entered Bridgeport *de novo* but for the proposed merger. It failed to carry this burden.

The status of both Connecticut National and First New Haven as potential competitors throughout the State was analyzed in depth by Professor Merton J. Peck. He concluded that the proposed merger would not have adverse effects on the structure of potential competition in Connecticut even accepting appellant's argument that potential competition was important and that savings bank competition, both actual and potential, should be ignored.

Appellant argues that Connecticut National and First New Haven are potential competitors through *de novo* branching throughout the State as well as by entry into each other's home office area. The District Court found that analysis of appellees' expansion history reveals strong objective evidence motivating against significant future *de novo* branch expansion. Connecticut National opened 15 *de novo* branches from 1961 to 1965. In the next five years the bank opened an average of only one office a year and the profitability of the bank in terms of return on investment increased by 30% (J.S. 46a). This objective evidence coun-

sels against the statewide branching program in which appellant would have appellees engage. This five-year branch expansion rate was the lowest among the nine largest Connecticut commercial banks (J.S. 46a).

Since 1963 First New Haven has opened only nine *de novo* offices of which five are in the City of New Haven (App. 1562). In 1971, nine of the bank's twenty-two offices were still showing operating losses aggregating $535,000 per year (J.S. 51a). Moreover, the average cost of a new branch office has steadily risen over the past decade to about $300,000 today (J.S. 47a, 51a).

Attractive branching sites in the State have become fewer and the ratio of population to existing banking offices is not sufficient to support the banking programs envisioned by appellant.

First New Haven's net income for the year ended 1973 ($2,564,490) decreased 6.5% from the comparable period in 1972 ($2,742,013).[46] The banks' capacity and motivation to embark on important new branching programs were examined in depth at the trial, and, in objective terms, the District Court found appellant's theories were unsubstantiated (J.S. 46a-51a). These findings were not clearly erroneous.

Similarly, with respect to those towns which are "open" to *de novo* branching in Connecticut, entry must be approved by regulatory officials who apply objective standards based on such factors as projected population and income. Testimony by the Regional Administrator of National Banks established that a number of public interest criteria are taken into account in the Comptroller's deter-

[46] This decrease is not surprising in view of the entry of the State's two largest banks into New Haven in competition with First New Haven.

mination whether to approve or disapprove a new branch. One of the principal standards in this process is the capacity of a particular community to support an additional banking facility; in short—the need for a new branch (J.S. 37a-40a).

Just as most "closed" towns in Connecticut consist of major population centers or medium-sized cities where the head office of a commercial bank is located, most "open" towns consist of suburban or rural areas without high densities of population. Thus, of Connecticut's 128 "open" towns, 41 had no commercial bank offices in 1972. These towns average 2,600 in population, a level which experience shows had not attracted any of the state's 64 commercial banks even to *seek* entry, whether or not the Comptroller, or the State Banking Commissioner and the FDIC would approve the application. In contrast the average population per commercial bank branch office in all "open" towns with one or more commercial bank offices was 5,633 in 1972 (J.S. 37a).

Clearly, an application to enter any town by *de novo* branching in circumstances where the addition of one office would result in a ratio of population per banking office significantly below the state average presents a formidable burden on the applicant to establish need and to convince the regulator that the community has the capacity to support the additional facility (J.S. 37a).

The District Court found that the addition of a single office in many of the "open" towns where one or the other of the appellee banks maintains an office would reduce the population per banking office to a point significantly below the state average (J.S. 38a-39a). In those "open" towns where neither of appellee banks is represented, it would, of course, require approval of *de novo* branches

of *both* banks before any future competition would develop. The addition of two new branches in many of these "open" towns would not only reduce the population per branching office below the state average, but even below the 2,600 threshold level at which, on average, *no bank* has been attracted to enter. Lack of economic opportunity in such a case (the expectancy of low level of return on invested capital) can thus be deemed either a barrier to entry or simply a lack of inducement to enter.

In either event, it was not appellee banks' burden to show that it is probable they would *not* enter such open towns, even though the record supports that conclusion, but rather appellant's burden to show that it is reasonably likely that the legal, regulatory and economic inhibitions to entry would be surmounted by *both* appellee banks thereby bringing them into competition in those towns and that the elimination of that possibility would substantially lessen competition. Appellant did not carry that burden and offered no objective evidence on the subject.

Even if entry into some of these open towns by both of the appellee banks seemed to be a possibility, contrary to the evidence, the question remains whether that possibility can have any competitive impact in light of the number, size and location of other banks which are, by objective criteria, *more* likely entrants.

Thus, if it can be shown that in ten years time, given projected population growth, a town could arguably support two more branch offices, the removal of one of the merging banks as a potential entrant cannot have any discernible effect on competition if there are in fact at least three more likely entrants ranked by size and geographic proximity. To test this hypothesis, Dr. Peck pre-

pared tables for all 165 "open" and "closed" towns in Connecticut (affected by the consolidation as areas of potential entry)[47] according to deposit size and geographic proximity to the town in question among the ten leading potential entrants.[48]

Dr. Peck's study was based on the fact that branching laws in Connecticut are written around towns, rather than some other unit, and result in towns being either "open" or "closed", and on the recognized fact that convenience plays a major role in the banking industry.[49] The starting point for assessing the effect of a bank consolidation on potential competition accordingly is the smallest geographic unit to which legal barriers to entry attach. This analysis demonstrated that the proposed consolidation would not eliminate the most likely entrant, ranked by size, into any "open" town in Connecticut (J.S. 30a) and that generally, ranked by both criteria of size and proximity, the bank affected by the consolidation does not even rank among the top ten most likely entrants (J.S. 31a).

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[47] *See* (J.S. 29a, n. 14).

[48] Dr. Peck testified that his analysis of potential competition took into account five of the six objective factors listed in appellant's answer to defendants' interrogatory 18, namely size, financial resources, demonstrated willingness to expand by *de novo* branching and/or merger with smaller banks, incentive to enter indicated by significant economic growth of the markets involved and geographic proximity. He testified that he did not take into account the sixth factor, "economic similarity of the markets", since he "wasn't sure exactly what this element was or how it would be quantified" (App. 766). A high degree of rank correlation was found among the first three factors of size, financial resources and demonstrated willingness to expand (App. 764-767). Ample factual basis was found by the District Court to support Dr. Peck's opinion that the town is the appropriate unit of analysis of potential competition.

[49] *See* note 29, p. 46.

The District Court found that in no case would there be less than four firms identified by appellant as having statewide capabilities left as potential entrants and the evidence supports that finding. In those few towns where either merging bank ranks among the top ten potential entrants, the District Court found that, even in terms of projected 1980 population there is no prospect that these towns could support more entrants than the number of banks ranking ahead of appellee banks by size and proximity (J.S. 38a-40a).

In summary, appellant's burden of proof to show some likelihood of potential competition between appellee banks throughout the State cannot be carried merely by showing that certain towns or metropolitan areas in Connecticut are enjoying good economic growth. A burgeoning town of 30,000 may well be "overbanked" from the vantage point of an outside bank or a regulatory official if there are already six or seven commercial or savings bank offices serving the area. The obstacles to new entry in such a case are substantial and the necessary regulatory approval less than assured. Moreover, the competitive significance of removing only one of many potential entrants into a banking market (which has never been empirically established by economic research and certainly has not yet been held unlawful) was not even addressed by appellant.

With Bridgeport and New Haven both closed to *de novo* branching, appellant's case consists of no more than an invitation to speculate on the ways these two banks might structure future moves to overcome those two inconvenient facts. The means suggested are (1) by engaging in major *de novo* branching programs into the "open" towns, (2) "toehold" acquisitions or (3) holding company affiliations through newly chartered banks. Each of these alternatives

was shown by appellees' evidence and found by the District Court to be either unavailable or subject to clear regulatory veto, or both, and inconsistent with the merging banks' economic motivations.

Professor Peck did not express any opinion on the likelihood of entry by either bank or the competitive weight to be given the "wings" effect. Instead, he analyzed the effect of the proposed transaction on potential competition *as though* it were important here, that is, assuming that appellant had proven the likelihood of entry, that there was a "wings" or "perceived" effect and that competition from savings banks should be ignored—all contrary to the record. In this way, Professor Peck's analysis focused directly on appellant's ultimate argument—that the proposed consolidation would be likely to result in a significant change in the structure of potential competition in commercial banking in the State of Connecticut.

The District Court found that Professor Peck:

> . . . limited his survey solely to commercial banks. He did not take into account the presence of savings banks; thus, it is evident that his conclusions would be strengthened if the competitive effects of savings banks had been considered.

(J.S. 29a).

His conclusion that the merger would not adversely affect the structure of potential competition among commercial banks in Connecticut and the objective factors on which that conclusion was reached were adopted by the District Court and it is submitted that this was not clearly erroneous (J.S. 28a, 99a). These conclusions and the findings on which they were based establish that the likelihood of Connecticut National and First New Haven encountering each other in *de novo* branching programs throughout the State

of the kind envisioned by appellant does not come close to being a reasonable probability. Appellant had the burden of proving that this was at least a reasonable probability and, clearly, it did not.

D. De Novo *Entry by Merger.*

(1) The "possibility that Connecticut National would have entered *de novo*" into the City of New Haven.

New Haven is a "closed town" under Connecticut Banking Law. Connecticut National is prohibited from opening a branch there. Appellant contends that it could enter the "New Haven market," which it equates with the SMSA, by acquiring one of five small banks outside the City of New Haven but within the New Haven SMSA. It contends also that Connecticut National could enter even the closed City of New Haven by forming a bank holding company, having friendly people apply for a new bank charter and then acquire the bank.

Appellant's claimed available "toehold" acquisitions in the New Haven SMSA, Hamden National Bank, Community Banking Co. of North Branford, Orange National Bank, Woodbridge Bank and Trust Co. and North Haven National Bank are all prohibited by law from opening offices in the City of New Haven where the bulk of First New Haven's business originates (App. 2221, 2223-2225). Appellant had the opportunity to offer testimony from officers of these "toehold" banks to show that their acquisition by Connecticut National could have a competitive impact on banking in the City of New Haven. It chose not to do so, offering only the testimony of an economist whose familiarity with the area consisted of attending "a couple

of Yale football games" (App. 218). The District Court, understandably, was not persuaded by this testimony.[50] The District Court found that "acquisition by CNB of Woodbridge Bank and Trust Company, assuming it could be done, would not constitute an effective entry into New Haven" (J.S. 52a). He pointed out that acquisition of Woodbridge Bank & Trust would not provide a means to branch into "the closed towns of New Haven, North Haven, Hamden, Seymour or others in the Greater New Haven area." (J.S. 52a-53a). The same findings were made as to the banks in North Branford, Hamden and North Haven (J.S. 53a).

The District Court found further that effective entry into New Haven would require that "at least one or two offices" be maintained in the central business district of New Haven, because of the large number of corporate headquarters located there and the fact that the downtown area of New Haven "cannot be served by acquisition of a single office bank in any of these distant towns" (J.S. 53a).

(2) The "possibility that First New Haven would have entered *de novo*" into the City of Bridgeport.

Bridgeport is also a closed town and First New Haven is prohibited by law from branching into it. Appellant argues that First New Haven should (a) acquire Lafayette Bank & Trust Co. or James Staples & Co. or (b) form a

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[50] (J.S. 51a-53a). From its own office experience, Connecticut National has no reason to believe that a suburban office will generate any significant business from the central city. Appellant's own exhibits show that Connecticut National's Shelton office (in the Bridgeport SMSA) draws less than $86,000 or 0.7% of its deposits from Bridgeport, and the Stratford office (also in the Bridgeport SMSA) draws 2.7% ($157,000) of its deposits from Bridgeport (App. 1521, 1522).

newly chartered bank, become a bank holding company and acquire the new bank.

If one were to put one's self in the position of the chief executive officer of First New Haven, which is competing now with the three largest banks in Connecticut in New Haven, with earnings down 6.5% in the past year, and nine of whose 22 branches were showing aggregate losses of $535,000 per year, the opportunity to acquire Lafayette at a substantial premium, to acquire James Staples & Co., an ineffective private bank also at a premium (with the possibility that its charter would be revoked as a result)[51] or to embark on a holding company-new charter venture of doubtful legality at substantial expense to enter Bridgeport which has had a population decline and a generally slow economy,[52] where it would compete with four larger commercial banks and a larger savings bank, one might well decide not to follow appellant's suggestions. But appellant argues that it is likely that First New Haven will do so. The District Court heard the testimony of the chief executive officer of First New Haven on this subject as well as the objective evidence of First New Haven's competitive posture on which it was based and believed him when he said he would not do so. This testimony may have been self serving and may even be viewed with suspicion but it is inherently credible. Appellant offered no evidence, objective or subjective, to contradict it.

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[51] See pp. 82-83, *infra*.

[52] Bridgeport's population declined from 1960-1970, while total employment increased only 3.4% in contrast to the state as a whole which realized population growth of 19.6% and an increase in total employment of 25% (App. 2202, 2203). New Haven's population declined 9.4% and total employment 9.5%. Manufacturing employment decreased 25.3% from 1963-1967 (App. 782-783, 788-789).

Under Connecticut's Banking Law, a bank entering a closed town by a toehold acquisition could retain only the acquired bank's offices but could open no other branches anywhere in the closed town (App. 52a). Thus, even if it were legal, an acquisition of James Staples & Co. in Bridgeport would limit First New Haven to a single office in the City of Bridgeport. Moreover, contrary to appellant's contention James Staples & Co. is *not* "suitable for toehold acquisition" by First New Haven (Appellant's Brief, at 49, 50).

No evidence as to the willingness of this entity to be acquired, or of its suitability for acquisition, was introduced at the trial, and the appellant's conclusion is without foundation. James Staples & Co. is both unsuitable and, as a matter of law, ineligible for acquisition. James Staples & Co. is a unique entity under the laws of the State of Connecticut: it is the State's sole remaining "private banker" destined to be the last of its kind by virtue of the provisions of §36-162 Conn. Gen. Stats. (1958), which established May 29, 1925 as the "Grandfather" date for conducting this business, preserving the rights of those so engaged prior to that date. As a private banker, the company is limited to the exercise of those specific powers set forth in Chapter 644 Conn. Gen. Stats. (1958) and the limitations are such as to make its business totally incompatible with that of a national bank. James Staples & Co. cannot even use the name "bank" generally, §36-161 (1958); its loan authority is limited to real estate mortgages and government guaranteed loans, thus eliminating the bulk of commercial bank loan activity §§36-166, 167 Conn. Gen. Stats. (1958); it has no authority to act in a trust or fiduciary capacity. *See* 15 Op. Conn. Atty. Gen. 136 (1929). Moreover, a merger or consolidation involving First New Haven and James Staples & Co. is ex-

pressly prohibited by both state and federal law. The company is a Connecticut partnership (Bank Commissioner of the State of Connecticut, *1972 Annual Report*, 7, 34, 139, March 6, 1973) and even if the problems of operational incompatibility described above could be surmounted, such an entity is not a 'state bank' for the purposes of the national bank laws, 12 U.S.C. §215b, nor is it a 'state bank and trust company or other banking institution' authorized under Connecticut law to merge or consolidate with a national bank, §36-93(1) Conn. Gen. Stats. 1958). Thus, James Staples & Co. presents no option whatsoever to First New Haven as a means of entry into Bridgeport.

In evaluating the market impact of the chartering of a new bank in a closed town by an existing bank, and how such a hypothetical even is "perceived" by those in the market, it is significant that no bank in Connecticut has ever attempted it. The District Court found that the State of Connecticut does not permit the chartering of a new bank for the purpose of sale to a holding company (J.S. 57a). Between 1962 and October, 1972, 32 applications were filed for new state charters, of which 17 were approved, 10 disapproved and no action taken on the balance (App. 2380).[53] None of these newly chartered banks was organized by a holding company. The Comptroller approved only three new charters in Connecticut from 1963 to the date of trial of the 25 applications filed (App. 2387-2391; 1029-1030). Two of the three were actually "interim" (or "phantom")

[53] The new bank chartered in Bridgeport after trial, referred to in (J.S. 28 n. 43) by appellant, is subject to the proscription in the Connecticut State Banking Department's charter application for new banks (App. 2017) that:

"This proposed bank is not to be organized for the purpose of selling to, merging or consolidating with any state bank and trust company or national bank now in existence."

banks formed by United Bank and Trust, a Hartford based bank, and CBT to facilitate acquisitions of existing banks.[54] The only new operating national bank was chartered in 1972 in Stamford with initial capital of $2 million. On July 24, 1973, after the trial, the Comptroller gave preliminary approval to a new charter in the town of Fairfield, requiring paid-in-capital of $2.5 million, the same amount required by the State Banking Department for the new charter approved in Trumbull after trial. Of four other state applications made in 1973, one is pending and one has been disapproved in Windsor Locks.[55]

Out of over 60 new charter applications filed and 20 approved in the past ten years by state and federal banking agencies, none has been by existing banks or holding companies to gain new entry. The State, moreover, has made it clear that it will not permit any new bank to be formed for the purpose of sale to an existing banking organization (App. 1313-1314) and no bank in Connecticut has attempted to use this route as a means of entry into "closed" towns.[56]

All of these obstacles apply even if a bank should determine that the substantial capital costs involved in these modes of entry will be incurred to the exclusion of other competing demands for capital investment in the bank's operation that are predictably more profitable.

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[54] *See, e.g.*, 38 Fed. Reg. 3118 (Feb. 1, 1973).

[55] The one application pending is in the City of Hartford. Towns newly closed to *de novo* branching by approvals of new charters since November, 1972 include Trumbull, Monroe, Fairfield, Shelton, Ridgefield, Clinton and New Milford. *Cf.* J.S. 6 n. 7.

[56] Legal barriers were cited by one witness as the reason (App. 1041). *Cf.* Whitney National Bank v. Bank of New Orleans & Trust Co., 323 F. 2d 290 (D.C. Cir. 1963), *rev'd on procedural grounds*, 379 U.S. 411 (1965).

There are a number of other more attractive investment opportunities for either of appellees than extensive *de novo* branching or toehold acquisitions even if the capital were available (App. 962-963). Pursuant to the Bank Holding Company Act of 1956, as amended (12 U.S.C. §1841 *et seq.*) and Regulation Y issued by the Board of Governors of the Federal Reserve System, a bank holding company may engage in any of the following activities: acquiring a personal loan company or mortgage banker; underwriting credit life, accident or health insurance when related to credit extensions of the bank holding company or its subsidiaries; servicing loans for any person; providing bookkeeping or data processing services such as payroll, accounts receivable or payable and billing services; courier services; management consulting advice to nonaffiliated banks; acting as investment or financial adviser; and leasing personal property or equipment or acting as agent, broker or adviser in the leasing of such property. 12 C.F.R. §225.4.

The legal, regulatory and financial obstacles described are high "barriers to entry" and the higher the barriers, the less significant is the influence of potential entry on the behavior of competitors already in an area protected by the barriers. Put simply, the competitors already present in a "closed" city, such as New Haven, do not take seriously the prospect that a Bridgeport bank will somehow climb the barriers, since there are no small, "toehold" banks headquartered in New Haven and the *de novo* charter route has never been attempted in Connecticut and would require the organizers to make false statements if they were organizing a state bank (J.S. 56a). Nor is it plausible that CBT, State National, City National and Connecticut National

all in Bridgeport and larger than First New Haven take seriously the prospect that First New Haven will be able to act out appellant's scenario and will, accordingly, modify their competitive behavior to forestall its entry.

If these banks were to take seriously the prospect that one or more banks not now in the City of Bridgeport could enter, surely Hartford National with assets of $1,791 million and Union Trust with assets of $720 million and Colonial Trust with assets of $397 million are all more likely entrants into Bridgeport than First New Haven. Obviously the elimination of First New Haven as a possible entrant into Bridgeport under these circumstances would not "substantially lessen competition."

With full cognizance of the criteria to be applied in potential competition cases—capacity and incentive of the merging banks to undertake *de novo* entry, the perceived competitive effects on the fringe of the market, barriers to entry, the number and strength of remaining potential entrants, the rank of the potential entrants, the rank of the potential entrants affected by the merger and the structure and trends within the market—the District Court took pains to apply all of the relevant legal standards to the facts on record. He found appellant's proof fell short. The court's findings and conclusions of law are not clearly erroneous.

E. *The Number of Competitive Alternatives Is Increasing and Concentration in the Connecticut Banking Market Is Decreasing.*

Appellant's reliance on allegations of raw state-wide concentration levels in its attempt to show that the merger would significantly contribute to an anticompetitive trend

in Connecticut does not withstand probing of the kind this Court has very recently shown to be necessary both in *Brown Shoe* and *United States* v. *General Dynamics Corp., supra.* The analysis of Connecticut's banking structure, pages 9-17, *supra,* demonstrates that the merger will not produce a firm controlling 11.3% or 10% of the State's banking market, as claimed in Appellant's Brief, at 63-64, since the deposits of all Connecticut's commercial banks do not realistically measure the size of the available Connecticut banking business for which appellee's compete, nor provide a reliable basis for assessing the competitive position that appellees' are likely to hold in the fast changing structure of Connecticut banking. As the Court in *General Dynamics Corp.,* 42 U.S.L.W. at 4371, took pains to note, " . . . statistics concerning market share and concentration, while of great significance, were not conclusive indicators of anticompetitive effects."

The "structure, history and probable future" of the coal industry in that case presented pertinent reasons why concentration figures built on production statistics were unsatisfactory standards for predicting future competitive strength.

Similarly, in a state where appellees will shortly be competing for over 90% of their customers with savings banks (which together control more deposits than all of Connecticut's commercial banks), it would be a shallow quantitative simplification indeed to stop the analysis of Connecticut's banking structure, history and *probable future* with the view that a merger producing a 10% market share of Connecticut commercial bank deposits as of 1973 would violate Section 7 without more when these banks, even in appellant's view, are not in significant com-

petition. Such a view would ignore proven Connecticut business in substantial amounts going to out-of-state banks as well as the imminent doubling of the number and strength of competitors serving Connecticut's retail banking market with one-stop banking.

Appellant demonstrates uncertainty in coming to grips with its fall-back position, that is, if the District Court correctly found the State as a whole to be the relevant banking market, this must be an illegal merger based on elimination of existing competition.

Appellant contends that the merger will produce an 11.3% market share (based on 1971 figures) and that such a merger is *per se* illegal under this Court's decisions in *Philadelphia, supra, Phillipsburg, supra, United States* v. *Von's Grocery Co.*, 384 U.S. 270 (1966) and *United States* v. *Pabst Brewing Co., supra.*[57] But in *Philadelphia, Phillipsburg, Von's* and *Pabst* the merging parties were in substantial direct competition with each other. In *Philadelphia* the head offices of the two banks were across the street from each other and the banks competed throughout the four-county area within which both were limited by state law in branching and merging.

In *Phillipsburg* the merging banks were direct competitors: "PNB and SNB are direct competitors. Their main offices are opposite one another on the same downtown street. SNB's only branch is across a suburban highway from one of PNB's two branches." 399 U.S. at 354.

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[57] As we discussed earlier, appellees' combined share of deposits held by Connecticut-based commercial banks was only 10.3% at year-end 1972 and when reduced by *proven* Connecticut business obtained by New York banks and sale of offices would be approximately 8.8%.

This Court's decision in *Von's* also involved two firms in direct competition with each other. Mr. Justice White described the two firms as *"substantial competitors"* and observed that "[T]he merger not only disposed of a *substantial competitor* but increased the concentration in the leading firms." 384 U.S. at 281 (emphasis added). Not only are Connecticut National and First New Haven not "substantial competitors" but the merger by definition would not increase concentration in either of the two claimed banking markets on which appellant offered its proof in the District Court. There would be no increase in the concentration ratios in the Bridgeport or New Haven SMSA's following the merger and, in fact, there would be a decrease, due to the decision by the two banks to sell six branches to new entrants.

Appellant's citation of *Pabst, supra,* is also inapposite. There this Court said "The merger of Pabst and Blatz brought together two very large brewers *competing against each other in 40 States.* In 1957 these two companies had combined sales which amounted to 23.95% of the beer sales in Wisconsin, Illinois and Michigan and 4.49% of the sales throughout the Country." 324 U.S. at 551 (emphasis added).

Cases holding unlawful mergers between companies which are direct competitors throughout their market areas have no application to this case where appellant has stated the principal question presented to be whether Section 7 is violated "by eliminating the two banks as significant potential entrants into each other's markets in metropolitan Bridgeport and New Haven and into local banking markets in Connecticut" (Appellant's Brief, at 2).

This case is a potential competition case by the appellant's allegations in the complaint, its proof at trial and its statement of the questions presented. In such a case market share figures taken from horizontal merger cases are largely irrelevant.

F. *The District Court Properly Found That This Merger Cannot "Trigger" Other Bank Mergers.*

The logic of appellant's claim that approval of the merger of Connecticut National and First New Haven will stimulate defensive mergers was not accepted by the District Court in view of the appellant's unique statutory authority, 12 U.S.C. §1828(c)(7)(A), to obtain an automatic preliminary injunction which makes virtually certain that no anticompetitive merger can be consummated without appellant's acquiescence (J.S. 101a).

No merger can be consummated without regulatory approval *and* the absence of appellant's opposition, thus assuring that each merger is considered case-by-case on its own merits. Appellant accordingly is asking this Court to assume that both the regulatory agency involved and the Department of Justice will not discharge their statutory responsibilities.

Appellant's one specific claim with respect to "triggering" is that "in October, 1973, after decision in this case, Union Trust Company and First Connecticut Bancorp., . . . sought approval from the Federal Reserve Board of their merger plan" (Appellant's Brief, at 6), suggesting that that merger was somehow "triggered". Appellant's own exhibit (App. 1994) points out that such a merger was a "long-expected move of a downstate bank into Hartford County."

First Connecticut Bancorp is listed by appellant as having 5.3% of the deposits in the claimed Hartford SMSA "market", where two of the three constituent banks of First Connecticut Bancorp are headquartered and where all three have offices (App. 1591). At the same time according to appellant, Lafayette Bank and Trust Company in Bridgeport is called an appropriate toehold entry for First New Haven (Appellant's Brief, at 50). Lafayette Bank and Trust Company is listed by appellant as having a 5.9% share of resident Bridgeport SMSA deposits (App. 1545). Given these facts, appellant appears to be arguing that a "toehold" acquisition of 5.9% is procompetitive in Bridgeport, but that another merger "triggered" by appellee's merger would have adverse effects on competition where the organization to be acquired has only 5.3% in Hartford by appellant's own standards and competes with the two largest banks in the state. Appellant's advocacy has led it to a strange result where a 5.9% acquisition is a procompetitive toehold and a 5.3% acquisition is a "triggered" anticompetitive acquisition.

The District Court need not have gone on to weigh the needs and convenience of the community because it found no violation of the Clayton Act.

V.

The Procompetitive Effects of the Merger Will Serve the Convenience and Needs of the Community

Since appellant showed no probable or even reasonably likely anticompetitive effects, appellees need not have demonstrated that the probable effect of the transaction in meeting the convenience and needs of the community to be served clearly outweighs any hypothesized anticompetitive effects.

Nevertheless, appellees established that the effects of the proposed consolidation will be procompetitive. Appellant's own expert, Dr. Murphy, testified that the consolidated bank would be a more likely entrant into Hartford than either of appellees individually, and appellees' expert, Professor Peck, concurred in stating that this greater likelihood of entry would have a procompetitive effect on competition (App. 513-514, 923-924; J.S. 66a).

Experts for both appellant and appellees agreed that entry by the consolidated bank into New London would be procompetitive. Presently, New London's only banks are the three largest banks in the State and New London is an "open" town because no commercial bank has its head office there. The consolidated bank would be better able to engage these banks in effective competition than either of appellees presently. Further, the court below found as a matter of fact that the proposed consolidation would enable the resulting bank to provide more significant competition for the two Hartford banks throughout the State and more particularly in Hartford itself (J.S. 102a). Capital for such expansion would be made uniquely available as a

result of the sale by appellees of six offices in the towns of Ansonia, Derby, Milford and Orange (J.S. 62a). As a witness called by appellant testified upon questioning by the court below, "the two Hartford banks and Union Trust will have an exclusive franchise in Connecticut if banks of defendants' size are not permitted to merge" (J.S. 65a). Enhancement of competition in Ansonia, Derby, Milford and Orange through the addition of consumer alternatives following sale of these offices will result directly from the merger.

These procompetitive effects, alone, clearly outweigh any theoretical effects on structure or performance that were the heart of appellant's theory. Such benefits to the needs and convenience of Connecticut's banking public were found, on substantial evidence, to be unavailable through alternative means.

VI.

Appellant's Linked Oligopoly Theory

It has been suggested that a pattern of linked oligopolies may develop in a banking market which may be "unaffected by fear of outside entry" and that such oligopolies "may engage in more standardized and hence less competitive business behavior in all the state's markets, rather than risk retaliation by departing from such standards in any locality" (Appellant's Brief at 34).

A review of the article[58] on which that theory is based, however, indicates little support for its application to Connecticut.

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[58] Solomon, Bank Merger Policy and Problems: A Linkage Theory of Oligopoly, 89 Banking Law J. 116 (1972), *cited at* Appellant's Brief at 34 n. 46.

It can be argued, for example, that, rather than promoting behavior which will avoid risking "retaliation by departing from [less competitive business behavior] standards" the merger of Connecticut National and First New Haven will enable First New Haven to compete more vigorously in New Haven with CBT and Hartford National, each now five times its size, with *less* fear of retaliation than it now logically ought to have.

In any event, appellant did not call the author of the article, Mrs. Eleanor Solomon, an employee and consultant of its Antitrust Division for many years, to testify at trial as to how, if at all, her theory of linked oligopoly applied to this case. According to the article the linked oligopoly theory may be expressed by the following equation:

> To summarize, in simplest mathematical terms, let p represent a composite variable, performance; let r represent interbank rivalry in its manifold price and non-price aspects; and let e represent a composite efficiency and service element.
>
> then $p = f(r, e)$; and
>
> $r = g(c, n, o, v, l, f)$, where
>
> c = market concentration, n = numbers of banking alternatives,
>
> o = potential competition, v = homogeneity of value systems,
>
> f = interbank associations, l = degree of intermarket linkage
>
> First-order partial derivatives are as follows: $\partial r/\partial n > 0$; $\partial r/\partial o > 0$; and, $\partial r/\partial f < 0$ $\partial r/\partial c < 0$; $\partial r/\partial v < 0$; $\partial r/\partial l < 0$. Because of merger "trends," or waves, the functional relationships between many of the variables may tend to show a critical point of inflection *(a)* as, for example, in the following plausible (but empirically unproven) relationship between interfirm associations, f, and the homogeneity of value system, v:
>
> $f = k \tan hl(v - a) + C$, where k and l are constants among a "family" of fv curves and a is the critical point of inflection of the individual fv curve which moves in response to structural (merger), regulatory, cyclical, and secular influences. 59

If Mrs. Solomon had testified, it may be that it would have developed that her theory had no application to Connecticut at all or that it would have shown that the proposed merger is procompetitive. It was up to appellant

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[59] *Id.* at 124 n. 12.

to come forward with such testimony at trial where it could be applied to the facts and be subject to cross-examination rather than to ask this Court to conclude that it supports appellant's theories when it does not even mention Connecticut banking.

Appellant cites other articles to support its position, the authors of which include staff members of the Federal Reserve System. If appellant intended to rely on these authors, appellees were entitled to cross-examine them, but they were not called despite the fact that appellant called a total of only four witnesses. There is no basis on which to speculate as to how they would have testified in this case, and the articles cited should, therefore, be totally disregarded as an attempt to repair on appeal what appellant failed to do at trial.

VII.

Substantial Factual Differences Distinguish This Case From *United States* v. *Marine Bancorp., Inc.*

In its Jurisdictional Statement in this case Appellant concedes that this case presents potential competition issues in "a different factual context" from *United States* v. *Marine Bancorp., Inc., supra* (J.S. 12, 13). Those factual differences are substantial.

In the *Marine* case, according to Appellant's Jurisdictional Statement, the acquisition being challenged is by "the second largest banking organization" in the state with "total deposits of $1.6 billion (22.8 percent of total deposits held by Washington commercial banks) . . . " (Marine J.S. 7). Here the larger of the two banks ranks fourth among commercial banks and sixth among all banks in

Connecticut with deposits of $412.2 million, representing, even according to Appellant, only "6.2 percent of deposits of commercial banks in Connecticut." (J.S. 7-8). As of year-end 1973 Connecticut National had only 6% of deposits of Connecticut commercial banks and 2.9% of the deposits of all Connecticut banks.

In the State of Washington no other competing system of financial institutions will offer a full range of retail banking services by the end of next year. Connecticut legislation, now in force, provides that no later than December 31, 1975 all 68 savings banks in Connecticut will have the power to offer personal checking accounts and accept demand deposits in all towns except those of less than 25,000 population in which the head office of a commercial bank with assets of less than $50,000,000 is located.

In the *Marine* case the size of the smaller bank "had increased by 50 percent" in the "five years preceding this merger" (Marine J.S. 6). First New Haven's size has changed only from $222 million to $282 million in the past six years and its share of deposits held by Connecticut-based commercial banks has decreased since 1966 from 5.5% to 4.0% as of year-end 1973 and from 2.7% of all Connecticut banks in 1966 to 1.9% as of year-end 1973.[60] In New Haven, First New Haven competes now with three banks larger than itself, two of which are over five times its size.

In *Marine* the District Judge announced his decision from the bench after trial and "adopted, without change, the defendant's proposed findings of fact and conclusions of

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[60] Computed from App. 1881, 2022, 2361; note 9, p. 14.

law" (Marine J.S. 10). This Court has had occasion to note that "mechanically adopted" findings ". . . do not reveal the discerning line for decision of the basic issue in the case." *El Paso Gas,* 376 U.S. at 657.

In conformity with that view, the District Court in Connecticut requested proposed findings of fact from both parties and issued carefully detailed findings six months after the trial which are clearly the product of careful independent judicial deliberation and can in no way be characterized as the wholesale adoption of findings proposed by either side. Appellant refers to "the unusual length of the District Court's findings" [61] (there were 293 separate findings of fact) but has declined to attack them directly, contenting itself with disagreements on minor points which have no material bearing on the District Court's conclusions.

Appellant contends that in the State of Washington "the sponsored bank procedure has become an established method by which national banks enter new markets in Washington" (Marine J.S. 9; Appellant's Brief in *Marine,* 16). It states that "Banks in the State of Washington . . . have entered *de novo* into areas foreclosed to branching by sponsoring the organization of an affiliate bank, and later acquiring the bank" (Appellant's Brief in *Marine,* 16). Appellant asserts that under the "sponsored bank" procedure, the bank must first be chartered by the Comptroller of the Currency as an independent national bank and "operated for a period of time as a *bona fide* and independent institution" *Id.* at 17. It is pointed out that Old National Bank of Washington has used the procedure on five occasions and that NBC itself "sponsored the forma-

[61] Appellant's Brief, at 13.

tion of an affiliate in a strategically located shopping center . . . for the purpose of acquiring it in the future." [42]

In the State of Connecticut no such entry has ever occurred or even been attempted and its legality has been questioned by the State Banking Commissioner.

Appellant contends in *Marine* that The National Bank of Commerce (NBC) could have entered Spokane by "acquisition of a smaller 'foothold' bank." There is no "foothold" or even "toehold" bank in the City of New Haven to be acquired by Connecticut National. First New Haven with decreased earnings and continued losses on nine of its branches is in no position to acquire The Lafayette Bank & Trust in Bridgeport, a bank with deposits at year-end 1973 of over $58 million. James Staples & Co., a private banker in Bridgeport with 1972 deposits of $2.1 million (App. 1545) would not provide First New Haven with a meaningful entry into Bridgeport and appellant made no attempt at trial to prove that it would. Appellant did not call any witness from James Staples & Co. Nor is it clear that if James Staples & Co. were to be acquired by First New Haven that its right to conduct a banking business under Connecticut banking law would survive. The Connecticut General Statutes (§36-162) provide that "Except as provided in this section, the right of any private banker to conduct the business of such private banker shall not be transferrable and such right shall be forfeited when such private banker voluntarily ceases the conduct of his business." Since it is clear that First New Haven could not merge with James Staples & Co. under Connecticut law, any acquisition would have to be an asset acquisition.

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[42] Appellant's Brief, *Marine, supra*, at 17.

This would likely result in the forfeiture of James Staples & Co.'s right to engage in the banking business.

NBC does not compete with two banks over three times larger throughout its service area as do both Connecticut National and First New Haven in their service areas.

In the *Marine* case, "the experts on both sides agreed that Spokane is growing" (Marine J.S. 17). Both Bridgeport and New Haven have experienced declining business and residential populations (J.S. 34a-35a).

Appellant contends that NBC was both a perceived and an actual potential entrant. It asserts that there was "objective evidence which established that NBC was perceived by other banks in Spokane as a potential competitor and as such exerted a 'beneficial influence on competitive conditions in that market'" and that its status as a perceived potential entrant was established by "documentary evidence" (Marine J.S. 15).

There was no such evidence in this case despite full discovery by appellant of appellees' files and its interviews with numerous prospective witnesses in the State of Connecticut. Appellant was aware of the importance of such evidence for when appellant had it, as in *Marine,* it used it.

NBC was said also to have had a "longstanding and conceded" interest in entering Spokane (Marine J.S. 17). NBC was claimed to be "one of only two institutions capable of entering Spokane *de novo* or by foothold acquisition" (Marine J.S. 21).

There was no such "objective evidence" in this case. The evidence presented was to the contrary. In Connecticut, even by appellant's standards, there would remain four

commercial banks capable of entering New Haven and five capable of entering Bridgeport if it ever becomes legally possible. In fact, the two "most likely entrants" into the City of Bridgeport by appellant's standards of size alone are Hartford National Bank with total assets as of year-end 1973 of $1.8 billion and Union Trust with total assets as of year-end 1973 of $720 million. The reason that appellant could not obtain "objective evidence" of the kind it claims to have had in *Marine* in this case despite ample opportunity to do so is because the evidence did not exist.[63]

The record in the *Marine* case allegedly showed "that the highly concentrated Spokane market was marked by interdependent . . . behavior in an atmosphere of friendly cooperation rather than vigorous price and service competition" and that there were "specific instances of cooperation between competitors in such matters as rates and service charges . . ." as well as other specific evidence of anticompetitive behavior (Marine J.S. 20). Again no such evidence was introduced in this case despite ample opportunity for appellant to obtain it during the period of more than one year in which it engaged in discovery.

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[63] It is noteworthy that in *Falstaff, supra*, on remand from this Court, appellant did not offer any additional evidence but submitted the matter to the District Court on the original record, despite the opportunity afforded by the remand to obtain evidence that Falstaff was "perceived" to be a potential entrant.

CONCLUSION

Appellant fell short in shouldering its burden of proof. The District Court found that the proposed merger would not tend substantially to lessen competition under any of the theories advanced by appellant. Its findings and carefully reasoned conclusions have not been shown to be clearly erroneous. The judgment of the District Court should be affirmed.

Respectfully submitted,

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April, 1974